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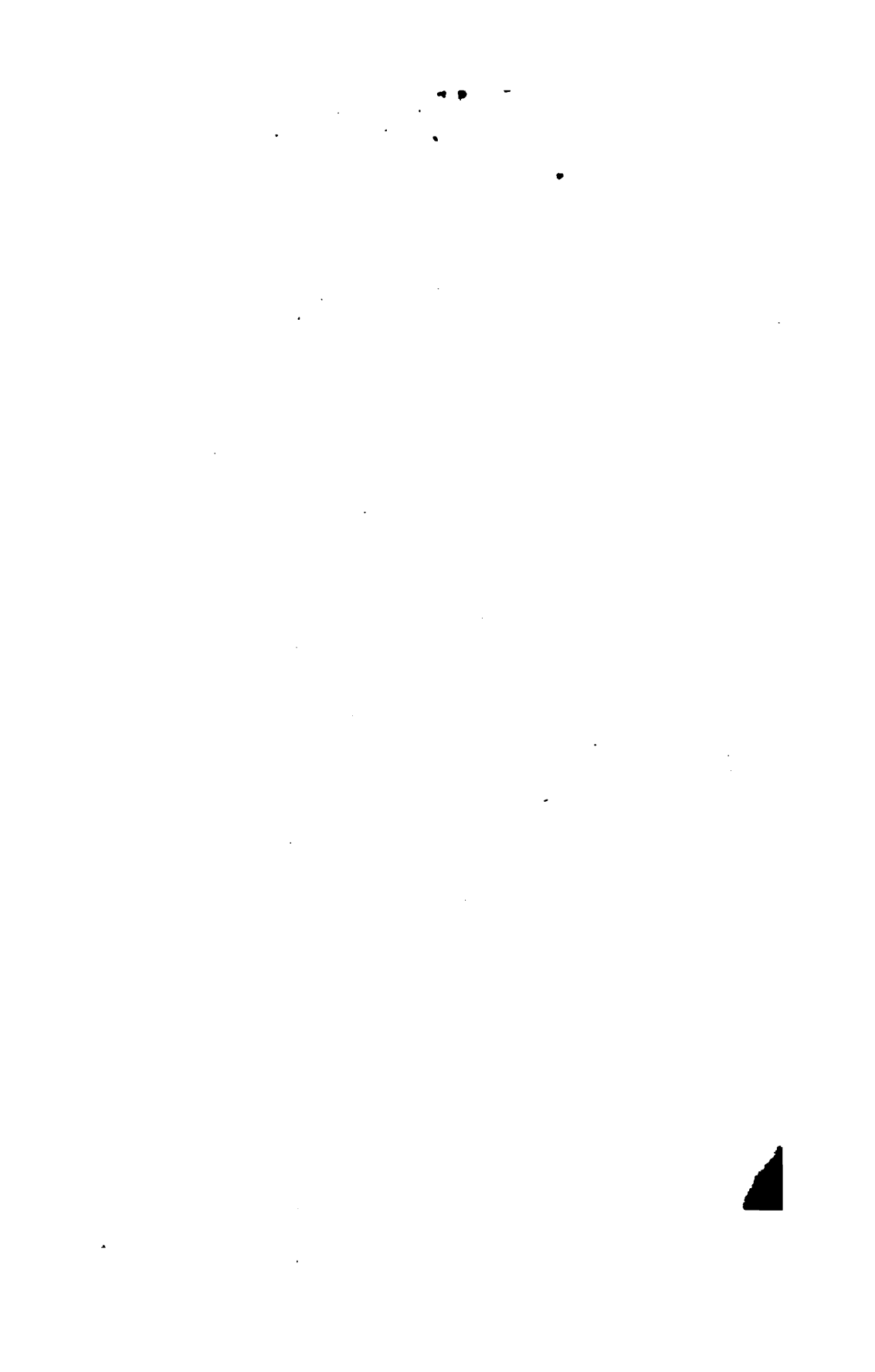
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NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS,

&c. &c.

NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS.

VOLUME V.

MICHAELMAS TERM 1846 TO MICHAELMAS TERM 1847.

LONDON:

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P R E F A C E.

THE great interest which has attached to the question recently raised as to the nature and effect of the ceremony of Confirmation of the Election of Bishops, and to the functions of the Metropolitan therein, has induced the Editor of these Notes to append to the present volume a Report of two cases (one in each Province), in which opposition to the Confirmation of two Bishops was offered : comprehending the forms of proceeding (according to modern practice), the decisions of the Archiepiscopal authorities upon the question of the right of Opposers to be heard, and a summary of the conflicting opinions of four Judges of the Court of Queen's Bench, in deciding upon the Rule *nisi* for a *Mandamus* to the Ecclesiastical authorities to hear and determine upon the Opposition.

THOMAS THORNTON.

April, 1848.

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CONSISTORY COURT OF BRISTOL.

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NOTES OF CASES.

MICHAELMAS TERM, 1846.

Prerogative Court of Canterbury.

NOVEMBER 6.

1st Sess.

WILD v. REYNOLDS.—*Motion, ex-parte.*—The testatrix, Mrs. Maria Reynolds, died 10th May, 1845, having made a will, dated 15th October, 1825, the purport of which is to bequeath some small legacies, including one of £10 to her son H. R., who had been provided for by his father, and the whole residue of her personal property in trust for her three other children. These children died in her lifetime, one of them leaving a child. After their death (which occurred before 1838, though this fact was not noticed in the Case), on the 2nd May, 1840, the testatrix executed a codicil, by which she republished the will of 1825. The executors and residuary legatees in trust had renounced; the surviving son, H. R., who was in Australia, had been cited, and the grandchild now prayed administration with will and codicil annexed.

Jenner, Dr., moved as above.

SIR H. JENNER FUST.—The question is, whether the 33rd section of the Statute of Wills has any effect upon the disposition. One of the residuary legatees left a child, and therefore, supposing the will to come within the 33rd section, the grandchild would be entitled to the share of her parent under the will. It is impossible to contend, in an *ex-parte* motion, that the codicil of 1840 brings the

Where a testatrix, by a will of 1825, bequeathed the residue of her personal property in trust for three of her children, who died in her lifetime (prior to 1838), one of them leaving a child, and after their death, executed a codicil, in 1840, republishing the will:—Held, that the legacies had lapsed, and were not revived, under the 33rd sect. of the Act, by the codicil. — Administration, with will and codicil, granted to the grandchild.

Nov. 6. will within the 33rd clause of the Statute. I am of opinion
Wild v. that the legacies to the deceased children have lapsed, and are
Reynolds. not revived by the codicil of 1840.* The grandchild, a party
entitled in distribution to the undisposed of residue, is enti-
tled to administration with the will and codicil annexed.

Jennings, Proctor.

Where a party, IN THE GOODS OF MARY HESLOP, SPINSTER, DEC.—
entitled in dis- *Motion, ex-parte.*—The deceased died 26th September,
tribution to an 1844, intestate, leaving several cousins germane, her only
intestate's ef- 1844, intestate, leaving several cousins germane, her only
fects, took out next of kin. In January, 1845, one of them, Mrs. M. F. P.,
administration took out administration in this Court, under the impression
under a belief that she and her brother (as alleged) that she and her brother were the only next of
that she and kin; but, discovering nine others, entitled in distribution,
her brother were the only next of kin, but, living in the province of York, and finding that it would be
were the only necessary or proper that the estate should be administered
kin; but, discovering nine others, entitled in distribution,
next of kin, but, living in the province of York, and finding that it would be
finding there necessary or proper that the estate should be administered
were other parties under the direction of the Court of Chancery, she prayed
parties equally en- that the administration granted to her should be revoked,
titled, and that and that a new grant might be made to another party,
the estate must T. H., who was willing to take it, all parties consenting.
be administered by the Court of Chancery (not
by the Court of The portion of the property left to M. F. P. was small, and
Chancery (not she had not intermeddled with the effects.
having inter- *Addams, Dr.,* moved to that effect.
meddled), ap-
plied for a re-
vocation of her
grant, and a new
grant to one of
the other parties,
who was willing
to take it, the rest
consenting:—The
Court refused
to revoke an
administration
properly granted.
ed.

Dec. 17.

* In V. C. Wigram's Court, in *Winter v. Winter*, where the testator,
by his will, in 1833, bequeathed a legacy to his son, who died in 1838,
leaving issue, and in 1839 made a codicil, not affecting the legacy to
his son, and, in all other respects, confirmed the will; His Honour
held, that the codicil, by republication, made the will speak as if exe-
cuted in 1839, and the legatee having died after the Wills Act came into
operation, the bequest to him, in a will after that date, had not lapsed,
and his executrix was entitled to it under the 33rd section of the Act.

NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS,

&c. &c.

High Court of Admiralty.

2nd Sess.

NOVEMBER 11.

Salvage.—A **THE "CHARLOTTE WYLIE."**—*Cause, by Act on Petition.*—This was an action by Commander Layton, the officers and crew of her Majesty's sloop *Cygnat*, to recover compensation for salvage services rendered to the brig *Charlotte Wylie*. The brig sailed from this country in July, 1844, with a cargo, for the coast of Africa, where she delivered her cargo, and took in part of a cargo home, and with that portion was returning, when, on the 14th of November, the master (Rands) and a seaman (Smith) were seized with the African fever, and a signal of distress was hoisted, which brought the *Cygnat* to her assistance. Capt. Layton boarded the brig, and removed the master and the sick seaman to her Majesty's ship, sending his gunner and three seamen to assist in navigating her. The vessels proceeded together, the sloop occasionally towing the brig, till the 20th, when, on their arrival at Prince's Island, whither the *Cygnat* was bound, Mr. Collier, her sailing master, was sent on board the brig to take charge of her to England; and the gunner and one of the crew of the *Cygnat* returned to her from the brig. The vessels then parted company, the *Charlotte Wylie* proceeding to England, where she arrived, with Mr. Collier and the two seamen of the *Cygnat* on board, on the 30th of January, 1845. On the part of the owner of the brig it was contended that the hands on board her, when the master left, were sufficient to navigate her home; that the mate (Turner) was competent to take charge of her; that Mr. Collier, the master of the *Cygnat*, was put on board the brig without necessity; that he was ill at the time, and, in fact, was sent to England on the brig for the sake of his health. It was further stated that Mr. Collier and the two seamen signed the ship's Articles, and their pay and wages had been claimed from the owner, and paid to the paymaster of the navy. Under these circumstances, it was urged that if the service was a salvage service at all

(considering that Queen's ships and officers were bound to assist British merchant vessels), it was one entitled to a very small recompense. On behalf of the salvors it was argued that the services rendered were of considerable value to the ship and cargo; that Mr. Collier was sent on board the brig by Capt. Layton, at the request of the master, who had certified that there was no person on board capable of navigating her; that the *Cygnel* had only eighty hands left, ten having gone with prizes to Sierra Leone; and that the allegations respecting Mr. Collier's illness were untrue, Mr. Collier himself denying in his affidavit facts sworn to by Turner, as well as the capability of the latter to take charge of the vessel. The amount of the property was about £1,300, namely, the ship £500, and the cargo £800; but there was some dispute whether freight, primage, and insurance should be deducted.

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Wyllie.*

Sir J. Dodson, Q.A., and Addams, Dr., for the salvors, ARGUMENT. contended that the service was one of salvage, the property being in peril, through the illness of the master, and the incapacity of the mate, who was unable even to assist in taking an observation.

Harding and Bayford, Drs., for the owner.—The service was so slight,—the supply of two men and a sailing-master to a vessel having a mate and a sufficient crew,—that, had it been rendered by a private ship, it would be entitled to a very slight reward; and the remuneration to salvors in the public service is always less than to those in a private situation. *The "Rapid."**

DR. LUSHINGTON.—It is now admitted that a service has *JUDGMENT.* been rendered to the vessel proceeded against, and that the real question is, what ought to be the amount of compensation which it would be fit to decree? That admission has been very properly and discreetly made by the Counsel, and the Court has only to regret, and deeply it does regret, that this cause should have been conducted upon a different principle, and that thereby a very considerable and unneces-

* 3 Hagg. A. R. 419.

Nov. 11. sary expense has been incurred, which must fall upon the owner.

*Charlotte
Wyke.*

Deductions
claimed from
the value of the
property.

In order to ascertain the amount of compensation to be given, it is necessary to have some *constat* of the value of the property. I repeat what I said at the commencement of the Argument, that where there is any dispute as to the value of the property itself, the proper course is, to take out a Commission of Appraisement; but where there is no dispute as to the value of the property itself, but whether certain deductions may be made according to law,—where the question is one, not of fact, but of law,—a Commission of Appraisement is unnecessary, because the very same question might, and in all probability would, arise after the Commission of Appraisement. The question of law is, whether the deductions the owner proposes to make from that which he admits to be otherwise the value of the cargo, are fit and proper. In all cases of salvage, those who conduct the service are entitled to have the value of the whole property stated,—that is, the ship, freight, and cargo; and where the freight is included in the cargo, they have it *de facto*, though not in the same manner as where the freight is considered as a separate and distinct item. Now there is no less a sum than £590, as stated, to be deducted for “freight, primage, and insurance.” With regard to freight, if it be deducted from the value of the cargo, it must be taken afterwards as a separate item, on which the Court is to decree salvage, and as no dispute is raised between the owners of the ship and the owners of the cargo, this item cannot be allowed. With respect to primage, I am not aware that that has ever been considered as a deduction: and, most assuredly, insurance cannot be allowed. I must take the value of the ship and the cargo together, on which salvage is to be decreed, at about £1,300.

Title of H.M.'s
officers to sal-
vage.

Dr. Bayford has called the attention of the Court to the principle adopted by my predecessors in the allotment of salvage. No doubt that principle is true, and I trust I shall not lose sight of it in the determination of this case. It is the duty of her Majesty's officers to render assistance, and they do not risk any property belonging to themselves when

they perform a service of this kind, though they incur a responsibility ; and they do not suffer a loss of their own time, because if the service be properly undertaken, they receive their ordinary pay. But that they are entitled to salvage (subject to these considerations) is a point fully admitted in this Court—indeed, it was solemnly decided in my earliest days by Lord Stowell, in the well-known case of an East Indiaman.*

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Let us consider what are the undisputed facts in this case. The facts. The undisputed facts are these :—This vessel having been on the coast of Africa, and taken in a part of her cargo, it was determined to proceed immediately homewards, and not to attempt to complete her cargo. While so proceeding, the master and one of the seamen were taken ill ; a signal of distress was hoisted, and both the master and the seaman were removed on board the *Cygnét*. The seaman there died, and the master, long after the two vessels had parted, recovered from that which was a very dangerous illness. The next fact in the case, though not of great importance, is, that Davidson, the gunner of the *Cygnét*, and three men, were put on board the *Charlotte Wylie*. While the two vessels were proceeding together on their way to Prince's Island, the *Cygnét* took the brig in tow. A third and more important fact is, that Mr. Collier, the master of the *Cygnét*, was put on board the *Charlotte Wylie*, to conduct her to England ; and two of the crew of the *Cygnét* accompanied him, and were placed on the ship's books, and they navigated the vessel to England.

Now, it is not necessary for me to decide a question mooted in this case, whether the two seamen who were put on board this vessel, having signed the Articles, are entitled to salvage or not. It is too unimportant a point to be worth a minute investigation, and besides, the distribution of this salvage must be governed by other and different rules from ordinary salvage ; by the Act of Parliament and the Proclamations which her Majesty has issued. If I were to attempt to decide it, it is a question of so small an amount,

* See also *The "Mary Ann,"* 1 Hagg. A. R. 158.

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Wylie.*

that it would be absolutely insignificant. But very much would depend on the question whether those two men were ever discharged from the *Cygnets*, and whether the signing of those Articles was or was not a legal act. It would be raising a question requiring great consideration for no purpose if I were to attempt to decide these points, respecting which I have no information. It is disputed by the owner, whether there was any necessity for Davidson and the three men being put on board, and it is alleged that the towing was superfluous. This is a small part of the case; but I think the answer is this—that the original crew of the brig consisted of the master and the man Smith (who were put on board the *Cygnets*) and seven others, and it is not to be apprehended that a merchant vessel would have more than a sufficient crew; and if you deduct two from nine, you leave only seven; and the probability is—I do not say certainty—that some inconvenience, some difficulty, would be incurred, even if no danger could actually ensue to the vessel. But this is a very small part of the service, and the towing is stated to have been for no other purpose than to accelerate the movements of the *Charlotte Wylie*, and save what is always valuable, the time of her Majesty's ship.

The more important question is, whether it was necessary or not, that any person should be sent from the *Cygnets* for the purpose of conducting the *Charlotte Wylie* to England; and that depends upon two questions of fact; first, whether or not the crew were sufficient; and, secondly, whether the mate was so skilled in navigation, as to be perfectly competent to conduct, with safety, his own vessel to her destined port. Now, independently of the question of fact, one must consider a little the probabilities of what would be done under these circumstances. I apprehend that it forms a part of the instructions of every one of her Majesty's vessels, especially on the coast of Africa, that they shall render assistance to British vessels in distress, whether it arises from the winds and waves, or, as is frequently the case, from the vessel becoming comparatively in a state of danger, in consequence of the crew having been affected by those maladies which are known to prevail in that region. Indeed, it

It be in the recollection of all who hear me, that, within the five years, there were two vessels the subjects of proceedings here for salvage, in one of which cases every one of the crew had died, and in the other but two survived. It is part of the duty, therefore, of an officer commanding one of her Majesty's ships to render assistance to our merchant vessels; but has he any motive to render such assistance, without being perfectly satisfied that such is his duty, and that the circumstances imperatively require it? It must be collected that, on the coast of Africa, it is absolutely necessary for the efficiency of every one of her Majesty's ships engaged in the suppression of the slave-trade, that she should retain her crew in full efficiency, for they are exposed to two particular dangers; one, the danger of sickness from the climate, and the other, that which occurs frequently, the weakening and diminishing the number of the crew by sending them with prizes to various ports. It is not, therefore, to be supposed that, under ordinary circumstances, any one of her Majesty's officers would be willing desirous of diminishing his crew for any purpose.

But it is said there were two reasons which operated on the mind of the commander of the *Cygnets*; the one, his own benefit and advantage in effecting this salvage; and the other, the illness of Mr. Collier, the master of the *Cygnets*. Now, unless the Court were satisfied from all the facts of the case, that there really was sufficient ground for imputing to one of her Majesty's officers the being actuated by a corrupt motive to disregard his duty, I could not draw such an inference; and when I consider the trifling amount of reward that can come into the pocket of Capt. Layton, it is far from probable that he would have exposed himself to the inconvenience of losing his master (one of the most important persons in the navigation of the vessel) without any prospect of adequate pecuniary recompense. With regard to the health of Mr. Collier, the statement of Dr. McCrae shews that he was an able and efficient officer, though suffering under temporary indisposition.

As to the incapacity of the mate, there has been a great deal of swearing on this point; and the mate himself, if he

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Wylie.

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were a credible witness, unquestionably speaks to his own capacity in very decided terms. But it is impossible to read his affidavit without perceiving that he is a person utterly regardless of the facts to which he was deposing, for he swears to matters as facts which were utterly beyond his own knowledge, and which it was impossible he could have any means of knowing. But it is said, and this argument was strongly pressed, that when this vessel arrived in the neighbourhood of St. Michael's, Collier told the mate, that if he did not get better, he should land there, and asked him whether, in case he did so, he, the mate, could take the *Charlotte Wylie* home; and the mate then told him he was quite able and ready to do so. It is said this is uncontradicted, and that the party is entitled to the full benefit of this uncontradicted fact. I entirely concur in that position. Now let us look at the value of the fact. It is this: that the question was asked by the master, under the apprehension that he should be compelled to land at St. Michael's, and this is the testimony of the mate to his own capacity. But for several weeks before their arrival at St. Michael's, Mr. Collier, a master in her Majesty's navy, had been sailing in company with the mate, and he had not ascertained, as a matter of fact, that he was capable of taking charge of the ship. If the mate were so competent, the fact must have been known to Mr. Collier. I do not think it necessary to follow this up more minutely, because I rather place the case on this ground, that, in all probability, additional hands were necessary—for the number deemed necessary for the safe-conduct of the vessel had been diminished—and not only so, but there was the loss of by far the most important person on board the *Charlotte Wylie*, namely, the master himself.

Claim pro-
nounced for.

It has been asked, from what danger this vessel was rescued? Why, from the danger of a long navigation, with a deficient crew, and possibly an incompetent master. With respect to the quantum, I am of opinion, that if I give £150, I shall come as nearly as possible to the justice of the case.

Proctors :—*Rothery*, for the salvors; *Nicholl*, for the owner.

Consistory Court of London.

NOVEMBER 18.

2nd Sess.

FRASER v. FRASER.—Cause.—This was a suit of divorce promoted by Mrs. Marianne Fraser against Mr. William Fraser, her husband, by reason of adultery by him committed. Mr. Fraser, not having appeared to the Citation, was (on the Fourth Session of Easter Term, 1844) pronounced in contempt, and the Libel was admitted *in parvam*. It pleaded the marriage of the parties (Mr. Fraser being then a bachelor, and Mrs. Fraser a widow, named Blair) on the 7th July, 1831; their cohabitation till the year 1842, and the birth of issue; that Mr. Fraser, in 1839, committed adultery with a young woman named Harriet Edwards, in the Queen's Bench prison (where he had been committed), and also after his discharge from thence, in the latter part of 1839, at Greenwich; that Mrs. Fraser had no knowledge of her husband's adultery until the 19th February, 1844, and that since that time she had had no sort of intercourse with him.

Immediately after the admission of the Libel, Mr. Fraser appeared, and being absolved from his contempt, asserted an Allegation, which was admitted without opposition. It pleads as follows:—

Divorce by reason of adultery by the wife against the husband, met by a recriminatory plea, charging adultery against the wife: the wife's charge sustained; the husband's not sustained.—Testimony of the alleged paramour, negating the charge against the wife. Such a person is a competent witness, but his evidence must be received with very great caution.

1845.
Jan. 18.

1—3. The marriage and cohabitation of the parties. 4. That Mr. Fraser was a barrister, on the Western Circuit, and attended the Exeter Sessions, and was necessarily absent from London about four months in each year, during which Mrs. Fraser usually remained at his residence in Melbury Terrace, and afterwards in Melcombe Place, near Dorset Square, where she was surrounded by her relations and friends; that some time on or before December, 1840, Mrs. Fraser formed, unknown to her husband, an adulterous intercourse with W. B., also a barrister, and an intimate friend of Mr. Fraser, occupying chambers in King's Bench Walk, Temple; that, during Mr. Fraser's absences from home, in December, 1840, and the spring of 1841, she frequently wrote to and received letters from W. B., visited him at his chambers, and remained alone with him for several hours together; that, on several

Nov. 18. of such occasions, divers great and improper familiarities passed between them, and they committed adultery together. 5. That *Mrs. Fraser* such visits of *Mrs. Fraser* were usually paid about seven or eight o'clock in the evening, and frequently once or twice in each week, and previous to such visits, *W. B.* frequently ordered a fire to be lighted in the bed-room, which joined his sitting-room, and coals to be placed near his bed-room fire, whereas usually no fire was lighted in the bed-room; that, upon the occasions of these visits, *Mrs. Fraser* used to dress so as to conceal her person, wore a veil over her face, and knocked at the outer door of the chambers with a gentle single knock; that *W. B.*, who, on other occasions, never answered the door himself, upon hearing her knock, went to the door, and conducted her himself into his sitting-room, dismissed his clerk, and remained alone in the chambers with *Mrs. Fraser*; that, upon some of such visits, the laundress of *W. B.*, by his order, fetched dinner and other refreshments from a tavern, and after having, by his orders, placed two plates upon the tray, and given it to him, was dismissed for the night; that, during the time *Mrs. Fraser* was in his chambers with *W. B.*, he would allow no one to enter the apartment, but kept the door locked, and himself carried into the room the dinner, tea, or any other refreshment which he had ordered; and that upon such occasions they committed adultery. 6. That the visits of *Mrs. Fraser* to the chambers of *W. B.*, accompanied by circumstances similar to those before pleaded, were renewed in the autumn and winter of 1841, and were continued at intervals in and throughout the year 1842, and during the former part of 1843, and that on many of these occasions they passed the night together in the chambers; that in the summer of 1841, and for many months, *Mrs. Fraser* was under the influence of a cough and wheezing produced by asthma, and that on many of the mornings following her visits to the chambers, her voice, affected by her cough and wheezing, was heard while in conversation with *W. B.* in his bed-room; that the cap and apron, and other articles of *Mrs. Fraser*'s dress, which had been worn by her on the preceding evening, were also found on several of such mornings in the sitting-room, and that the bed presented the appearance of two persons having slept therein; and that they committed adultery. 7. That on one occasion, towards the end of 1841, *Mr. F.*, who occupied chambers under the same roof with *W. B.*, in King's Bench Walk, Temple, happened to call on him while *Mrs. Fraser* was with him, and that, on such occasion, she was secreted by *W. B.* in his bed-room, while he spoke to *Mr. Fraser* at the outer door of his chambers, and declined an invitation to

dinner, on the ground of being engaged. 8. That, during the whole period pleaded in the next preceding article, Mrs. Fraser, upon the occasion of her husband's professional absences, was in the habit of spending her evenings from home; that she used to go out alone, which she had never before done; frequently slept from home, declaring she intended to sleep at Mrs. Captain Fraser's, and on her return home next day, told her servant she had so done, whereas she never did sleep there, and that on all or most of such occasions she repaired to the chambers of W. B., and committed adultery with him there, as pleaded in the next preceding article; and that on several occasions, on her return home after such absences, her own pocket handkerchief has been missing, and instead thereof, a pocket handkerchief belonging to W. B. has been found upon her person, and was returned to him by her direction. 9. That, in the summer of 1841, during the absence of her husband on the Circuit, Mrs. Fraser hired a ready-furnished cottage at Broadstairs, where she went with her children and servants; that she was there, in the early part of August, 1841, unknown to Mr. Fraser (except as after pleaded), joined by W. B., who remained there on a visit to Mrs. F. until the 26th August, when he accompanied her back to London; that, during his visit, and in returning to London, she frequently addressed W. B. as "My dear;" that Mrs. Fraser and W. B. used frequently to sit up alone together late at night, and after they had ordered the servants to go to bed; that on a morning, during the latter part of such time, Mrs. Fraser went into the bed-room of W. B., which adjoined her own, whilst he was still in bed, with only her night-gown on, and a loose dressing-gown over it, and having brought from thence one of the children, who slept in the same room with W. B., and given it to the nurse to be dressed, returned herself into the said bed-room, and, shutting the door after her, remained therein alone with W. B. for a considerable time; that, on the 22nd of the said month of August, Mrs. Fraser wrote and sent by the post to Mr. Fraser a letter, in which she falsely represented to him that W. B. had come to Broadstairs on the (then) last evening only; and that, on many occasions during the period articulate, they committed adultery. 10. Exhibits the letter referred to in the preceding article. 11. That on the 6th October, 1841, Mrs. Fraser was confined of her fourth child at her residence in Melcombe Place, and that, very shortly after her confinement, Mr. Fraser was obliged to attend the Exeter Sessions; that within a few days after her confinement, and while Mr. Fraser was so absent from London, W. B. called upon Mrs.

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Nov. 18. Fraser at her house, walked up into her bed-room, and remained alone with her there; that they, on such occasion, dined alone together in her bed-room, and once or twice, shortly afterwards, they again dined together in the bed-room, and drank tea together, and spent the evening alone together there; that W. B. brought Mrs. Fraser presents of money, and warm stockings and other things, and from and after such time became a very frequent visitor at the house, such his visits being unknown to Mr. Fraser, and at times when he was absent; that they were continued during the remainder of 1841, and the early part of the following year, and upon such occasions Mrs. Fraser used to remain alone with W. B. for hours together, having previously ordered the servants to shew any visitors who might happen to call into another room; that on many occasions W. B. used to remain alone with Mrs. Fraser until ten or eleven o'clock at night; that they were observed to sit and recline close together on the same sofa, and Mrs. Fraser appeared to be greatly disconcerted whenever any person happened to enter the room unexpectedly; that great and improper familiarities passed between them, and that after the departure of W. B., Mrs. Fraser's hair and dress appeared much disordered; and it pleads adultery. 12. That from and after Whitsuntide, 1842, Mr. Fraser, in consequence of pecuniary embarrassments, absented himself from home, with the full consent of his wife; that in August and September of that year, Mrs. Fraser (who possessed a competent fortune to her separate use) was resident at Brighton, with her children and servants, without her husband's knowledge; that she was joined there by W. B., who remained with her at Brighton for several days, dining at a hotel, but spending a large portion of each day with her, remaining with her every evening till late at night; that, on the last day of his being there, Mrs. F. and he dined together, and in the evening Mrs. Fraser gave all her servants, except the nurse, leave to go out, of which they availed themselves, and that she afterwards, contrary to the wish of the nurse, who was unwell, sent her out on a message, and that Mrs. Fraser and W. B. were thereupon left alone, and remained alone together there until late at night; and it pleads adultery. 13. That, shortly after W. B.'s departure for London, Mrs. Fraser went thither for a week, leaving her children and servants at Brighton; that, upon her arrival in London, she was met at the railroad station by Thomas Smithard, a clerk of W. B., with whom she proceeded to W. B.'s chambers, upon reaching which, W. B. immediately despatched his clerk for refreshments; that, upon his return, Mrs. Fraser was

without her bonnet and shawl, and seated at a desk with her bonnet-cap on; that the sofa was disarranged, the two pillows being placed at one end of it, which was unusual, and W. B. appeared greatly heated and excited; that immediately the luncheon had been placed upon the table, W. B. told his said clerk he might go away for the day, and locked the outer door, remaining himself alone in the chambers with Mrs. Fraser; that, every day during the week of her stay in London, Mrs. Fraser visited W. B. at his chambers; and it pleads adultery. 14. That, in June, 1842, Mrs. Fraser, without making any communication to her husband, went to live in lodgings in York Buildings, New Road, where, on the 9th December, 1842, she was confined of her youngest child; that, prior to her confinement, she applied to W. B. for an old shirt, to be used as old linen, necessary for such an occasion, and also received presents of money from him; that, on such occasion, she kept her bed for about ten days, during which time she allowed W. B. to visit her in her bed-room, and remain with her there for a considerable time, and that afterwards he was constantly with her in the drawing-room, where a sofa-bed was made up for her, and that throughout her illness, W. B.'s conduct towards her resembled that of a fond husband; that, both before and after such time, W. B. frequently visited Mrs. Fraser, and was in the habit of dining alone with her, and of remaining alone with her until late at night; that they were repeatedly heard to kiss each other, and that he continued thus to visit her there until he went to Ramsgate in the summer of 1843, and also after her return in the autumn; that such visits of W. B. to Mrs. Fraser were wholly unknown to the different members of her family and friends, and that whenever any of them visited her, she either caused herself to be denied to them, or secreted W. B., by shewing him into an inner room, or by causing the persons so calling to be shewn into a different room; and it pleads adultery. 15. That, in the middle of July, 1843, Mrs. Fraser, with her servants and children, but unaccompanied by, and unknown to, Mr. Fraser, went to Ramsgate, where she remained for about ten weeks; that, in September, W. B., having just returned from the Continent, visited her at Ramsgate, remaining there for about a week; that, during his stay, he used to pass his whole time with Mrs. Fraser, coming to her house between seven and eight o'clock in the morning, and accompanying her in her walks, and taking all his meals with her, and remaining alone with her until late at night; that in the sitting-room of the lodgings which Mr. Fraser occupied was a sofa, and that she and W. B. were frequently found sitting close

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Nov. 18. together upon the same; that her dress was on such occasions tumbled, and her hair disordered, and that, upon being interrupted, she appeared greatly disconcerted; also that, during W. B.'s stay, she allowed him to take her to bathe, and allowed him, after she had come out of the sea, to open the door of her bathing-machine while she was undressed therein, and that she also allowed her eldest child, a girl of about ten years of age, to bathe in the same machine and alone with W. B., notwithstanding the remonstrances of the nurse upon the impropriety of such conduct; that when Mrs. Fraser and W. B. were alone together on such occasions, he has been observed to kiss her; and it pleads adultery. 16. That, from and after the time when Mrs. Fraser formed her criminal intercourse with W. B., she disliked and avoided the society of her husband, and made herself so disagreeable to him, and his home so uncomfortable, as to compel him to remain at his chambers; that, having left home on the 16th May, 1842, as before mentioned, Mrs. Fraser, on the 1st June, wrote and sent a note to him, intimating that, as her movements seemed unsettled, he should thenceforward direct his letters to her solicitor; that in the said month of June, 1842, she quitted her residence in Melbury Terrace, and from such time she received the visits of W. B. at her house in Melcombe Place, and afterwards in York Buildings, and received presents of money from him, and that, in order the better to carry on her adulterous intercourse with W. B., she concealed the place of her abode from her husband, and ceased to write to him; that she did not inform him even of the fact of her being with child at the time when he was compelled to quit his house, and never announced to him the birth of her youngest child, nor informed him of the name by which it was christened. 17. Exhibits the note referred to. 18. Pleads identity and diversity. 19. That reports to the prejudice of his wife, and implying the existence of her criminal connection with W. B., were first conveyed to Mr. Fraser in July, 1843, and that he thereupon instituted inquiries, but was unable to trace such reports to any credible source; that, in the early part of November, 1843, Mr. Fraser, under the pressure of pecuniary difficulties, had determined to practise as a barrister in India, and having obtained the necessary means, was on the very point of leaving this country for India, with the privity of his wife, when W. B. informed certain persons of his plans and intentions; that this circumstance led to inquiry and investigation on the part of Mr. Fraser, and ultimately to the discovery of his wife's adultery, which he thereby became acquainted with for the first time.

An Allegation on behalf of Mrs. Fraser, responsive to the foregoing, was admitted (May 9) without opposition, which pleaded as follows :—

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2. That, in or before the year 1838, Mr. Fraser became intimate with W. B., and from that time had constant recourse to him as a confidential adviser in respect to his affairs, which had long been in a very embarrassed state; that from such time, or earlier, Mr. Fraser was frequently absent from his home and wife for long periods together, as well professionally as for other reasons or on other pursuits; that, towards the end of 1838, he introduced W. B. to his wife, who from such time, by Mr. Fraser's desire, communicated freely with W. B. on the subject of her husband's pecuniary embarrassments, and the difficulties in which she was herself thereby involved, and that, but for the information afforded her by W. B., she would have been often long together without any tidings of Mr. Fraser, who neglected to correspond with her, W. B. being the appointed and only channel of communication between them on many occasions when Mr. Fraser was absent from his wife. 3. That Mrs. Fraser never paid any visits to W. B. at his chambers of an improper kind, or clandestinely; that she never went alone there, except on the business of Mr. Fraser, or to hear from W. B. of her husband, then absent from her, as she did in October, 1840, when Mr. Fraser protracted his return from the Continent; that Mrs. Fraser, being naturally of an anxious disposition, and liable to excitement, had recourse, under such circumstances, to W. B., in whom Mr. Fraser had taught her to place every confidence, for information and advice, and in order thereto, did sometimes call upon him at his chambers, without any female or other companion, but she never went to or remained in his chambers at any unreasonable hour, or for any other than the cause now mentioned; and it expressly denies that she ever went or was shut into W. B.'s bed-room, or ever passed the night or committed adultery with him, or was ever secreted in his bed-room or elsewhere, whilst he spoke to Mr. Fraser. 4. Counterpleads the 5th article of the adverse Allegation. 5. That Mr. Fraser's extravagance and suspected infidelity gave great uneasiness to his wife, and occasioned frequent disputes between them, in reference to some of which W. B. (amongst others) was appealed to by both parties; that, on the occasion of one of such disputes, in the summer of 1841, Mr. Fraser introduced W. B. into the bed-room of his wife, then confined to the room and on a sofa, through illness, when, after a lengthened dispute, Mr. Fraser quitted the room, in

The wife's responsive Allegation.

Nov. 18. which W. B. and Mrs. Fraser were of course then left alone together, but W. B. soon after quitted the room. 6. That W. B.'s visit to Mrs. Fraser at Broadstairs, in August, 1841 (mentioned in the 9th article of the adverse Allegation), was made at the express request of Mr. Fraser; that W. B. arrived at Broadstairs, not in the early part of the month, but on the 21st, as truly represented by Mrs. Fraser in her letter to her husband; that Mrs. Fraser, who, during all his visit, had a female friend staying with her, never on any occasion went into W. B.'s bed-room whilst he was in bed for any purpose, and it denies that they ever sat up alone together late at night, and that any improper familiarities passed between them. 7. Counterpleads the 11th article of the adverse Allegation, and pleads that, if W. B. saw Mrs. Fraser during her confinement, in October, 1841, in her bed-room, it was not more than once, when she was not in bed, and alleges that the visits of W. B., stated in the 11th and 14th articles to have taken place in the years 1841, 1842, and 1843, took place openly, and without concealment of any kind, and were not merely well known to Mr. Fraser, but made in most instances at his express request and solicitation. 8. That, when Mr. Fraser absented himself from home, in May, 1842 (as mentioned in the 12th article), by reason of certain executions sued out against him, he conveyed to W. B.'s chambers several boxes, which led to Mrs. Fraser's going several times to the chambers, and, at the request of Mr. Fraser, W. B. made known to her the pressing nature and extent of her husband's embarrassments, and advised with her upon the subject. 9. Counterpleads the 12th article of the adverse Allegation, and pleads that the only occasion on which W. B. visited Mrs. Fraser at Brighton was on his return from Lewes, where he had been attending the Assizes, and on the occasion of such only visit he took his leave of her and returned to his hotel early in the evening; that Mrs. Fraser soon after went to London to consult her solicitor, on account of her husband's desertion of her, and she went, openly and without any concealment, from the railway terminus to W. B.'s chambers, whence, after partaking of some refreshment, in about half an hour, she proceeded to a boarding-house in Dorset Square, and she remained confined to the house by a sprained ankle from the second day of her arrival, without paying any second visit to the chambers of W. B. during the rest of her stay in London. 10. That a laundress used to apply to Mrs. Fraser for old linen, and such an application having been made in the hearing of W. B., he sent her some linen through Mrs. Fraser, who never applied to W. B. for nor received (save as aforesaid)

any linen, and on no occasion received any presents of money or otherwise, from him (as pleaded in the 14th article); that, at the repeated request of Mrs. Fraser, who was then in a very nervous and distressed state of mind, in consequence of her husband's absence and his pecuniary embarrassments, W. B. did, on one occasion, when he called at her house, go to speak to her in her bed-room, which she was then unable to leave, it being soon after her confinement, namely, in December, 1842; that, save on such one occasion, W. B. did not visit her in her bed-room during such confinement, and when he afterwards called upon her during her said confinement, he always saw her in the drawing-room, where was not a sofa-bed. 11. Counterpleads the 15th article of the adverse Allegation, and denies that Mrs. Fraser ever bathed at all during her visit at Ramsgate in 1843, and that she allowed her eldest daughter, or any of her daughters, to use or bathe out of the same machine with W. B. 12. Counterpleads the 16th article. 13. That, some time towards the end of 1843, Mrs. Fraser, at the urgent entreaty of her husband, advanced him £200, borrowed on the credit of her separate fortune, to enable him to proceed to India, it being his wish to go out, in order to practise there as a barrister; that he, however, neither applied that sum to the purpose for which it was borrowed, nor has since returned any part of it to Mrs. Fraser or her trustees; it denies the statements in the 19th article of the adverse Allegation, as to the reason of Mr. Fraser's not proceeding to India, and pleads that his detention in England was owing to certain of his creditors threatening to advertise him as a swindler in the public papers of India, if he left this country without first satisfying their demands. 14. Pleads the action in the Court of Common Pleas by Mr. Fraser against W. B. for crim. con. with Mrs. Fraser, in which the defendant pleaded "Not guilty," which was tried before a Special Jury on the 22nd February, 1844, who returned a verdict for the defendant.

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It being deemed necessary, on behalf of the husband, to examine, in support of his Allegation, Thomas Smithard, late clerk to W. B., but then a private in the 9th regiment of Lancers, stationed in the East Indies, a Requisition was applied for, to which the wife objected; but, her Proctor having been heard upon his Petition, the Court over- June 7.
ruled the objection, and allowed the Requisition to issue.*

* 4 Notes of Ca. 157.

Nov. 18. A further Allegation, on the part of Mrs. Fraser, was
Fraser v. Fraser. admitted without opposition, which pleaded adultery committed by Mr. Fraser with Mary Ann Chasty, and his living and cohabiting with her, at 16, Duke Street, Portland Place, from some time in September, 1843, to some time in January, 1844, and at 19, Sherborne Street, Dorset Square, from March, 1844, till the end of that year or the beginning of 1845; that he was then living and cohabiting with her at some place unknown; and that this adulterous connection only came to the knowledge of Mrs. Fraser since the commencement of this suit.

July 7 & 21. *Addams and Waddilove, Drs., for Mrs. Fraser.*
 ARGUMENT. *Phillimore and Bayford, Drs., for Mr. Fraser,* denied that either of the charges of adultery alleged against him had been proved by witnesses upon whose evidence the Court could rely, whereas nothing could be more fully and satisfactorily established than Mrs. Fraser's adultery.

Nov. 18. DR. LUSHINGTON. (After stating the result of the evidence upon the Libel and second Allegation of the wife, namely, that the charges of adultery against Mr. Fraser, in both pleas, were completely established.)

At last, I come to the real, and indeed the only, question in this cause: Is the charge of Mr. Fraser against his wife, of having committed adultery with Mr. B., substantiated by the evidence?

Mr. Fraser, some time in the year 1843, brought an action against Mr. B. for crim. con. with Mrs. Fraser, Mr. Fraser at that period being separated from his wife. This action was tried in the Court of Common Pleas, before the Lord Chief Justice, in February, 1844, the trial commencing on the 19th and lasting four days, and a verdict was found for the defendant. Shortly after this, the present suit was brought by Mrs. Fraser.

Effect of the
 verdict upon
 this cause. Whether this verdict ought to have any and what effect upon this cause, and how far it should have any weight with me, is a question which I will dispose of in the first instance. I am speaking of the verdict, not of the bringing the action, nor of the circumstances which occurred at the

trial. I am of opinion that this verdict ought not to influence my mind in the consideration of this case, and for divers reasons. The same persons may not be examined in both cases; the action is, *quid* this suit, *res inter alios acta*; that which is evidence against Mr. B. might not be admissible evidence against Mrs. Fraser; and in this suit, evidence might be received for or against Mrs. Fraser, which could not be received for or against Mr. B. For these and many other reasons, I am of opinion that the verdict ought not to influence my judgment in favour of Mrs. Fraser, and much less ought any evidence as to the opinion of the Judge* who tried the case operate on my mind against Mrs. Fraser. I dismiss, therefore, from my mind all further consideration of the verdict; but of the verdict only. Although this is my opinion as to the verdict, I think that the bringing the action, and many circumstances attendant thereon, may possibly have some weight on the present occasion. The fact of bringing such action tends to shew this, at least; that the plaintiff was not afraid to subject his witnesses to a *vivâ voce* cross-examination.

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In all these cases, the first consideration is, the credit due to the witnesses; and next, where they do not depose to facts necessarily importing adultery, whether the inference from the whole circumstances of the case ought to be "guilty" or "not guilty." This is not a case in which either conclusion can be easily arrived at. It is my intention to proceed

* This was said with reference to the answers to the 65th interrogatory:—"Was not the opinion of the Lord Chief Justice of the Common Pleas, who presided at the said trial, clearly in favour of a verdict for the Ministrant (Mr. Fraser), as plaintiff? Was not his summing up clearly in favour of such a verdict?" And further, upon an application for a new trial, whether the Chief Justice, in refusing it, did not say that the case was "certainly one of great suspicion, but the Court were of opinion that something stronger than mere suspicion was necessary to induce the Court to set the decision of a Jury aside; and although it might have been better if the Jury had been guided in their verdict by the opinion of the Court, still, on the whole, the Court thought it was better to adhere, on a general principle, to the decision of a Jury, than to set aside a verdict, and thus to cause the action to come a second time before a Jury?"

Nov. 18. with this case, in the first instance, without reference to the evidence of Mr. B., at least as to any contested fact, and then to make his evidence the subject of a separate consideration.

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By the 4th article of Mr. Fraser's Allegation, Mrs. Fraser is charged with having formed an adulterous intercourse with Mr. B. some time prior to December, 1840, and I think it will appear very important to bear in mind the dates alleged in the plea. The period fixed by this article is December, 1840, and the spring of 1841.

Evidence on
the husband's
Allegation.

The first witness is Jessie Salter, and she was nurse in the service of the parties from August, 1839, till May, 1843, with the unimportant exception of two months. During this time, their residence had been first at Melbury Terrace, and from Michaelmas, 1840, at Melcombe Place, till May, 1842, when a separation took place, on account (as this witness says) of Mr. Fraser's "pecuniary difficulties." During the period stated in the 4th article, therefore, Mrs. Fraser was resident at Melcombe Place. It further appears from the testimony of this witness on the 4th article, that Mr. B. was an intimate friend of Mr. Fraser; that, during the time pleaded, he was constantly, during the absence of Mr. Fraser, at his house; that he often called and took Mrs. Fraser out; and that a correspondence took place between them. This is all the evidence of this witness properly admissible on this article, and it is abundantly clear that here is no proof of adultery, though it is strong evidence of a very great intimacy between Mr. B. and Mrs. Fraser. It may be important as connected with other evidence, but alone it cannot prove guilt. I used the expression, "evidence properly admissible," advisedly, because Jessie Salter has deposed to Mrs. Fraser's absenting herself at night, and not going to Captain Fraser's house, as she said she intended to do. I am wholly at a loss to know how this part of her evidence is to be tacked on to the article, except, indeed, I am to jump to the conclusion that Mrs. Fraser's absences from home were proofs of visits to Mr. B. This I have not even been called on to do, and if I cannot do this, the whole of this part of Jessie Salter's evidence is manifestly extra-

articulate. How it got there I cannot tell ; it belongs to the 3rd article. If not extra-articulate, it would amount to this : an unexplained circumstance of suspicion, but not connected by the evidence with Mr. B. The witness does not mention any connecting link to shew a connection with Mr. B. at all. I shall hereafter advert to her evidence on the 8th article, but I must proceed very cautiously, and step by step.

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The next witness to whom I shall advert is Mary Cameron ; but at present it is not necessary to examine her evidence with any particularity, and her evidence does not carry the case one step further, as relates to the 4th article, than that of the preceding witness.

Elizabeth Arnold is the woman who attended Mr. B.'s chambers. With the exception of a general averment, that Mrs. Fraser staid frequently alone with Mr. B. there all night,—evidence which I shall consider hereafter, because it is given specifically on subsequent articles, here she swears broadly and in general terms that Mrs. Fraser did frequently stay alone with Mr. B. all night,—her testimony, if credible, would go to prove correspondence, and delivery of letters and parcels.

The only other witness on this article is William White-law, and he corroborates the other witnesses as to the visits of Mr. B. and the communication by letters and parcels.

Subject to the reservations I have already made, and especially as to the evidence of Mrs. Arnold,—that is, as to her general swearing,—I think that the true result of the evidence upon the 4th article, assuming the whole to be credible, is, that a great intimacy subsisted between Mrs. Fraser and Mr. B., but an intimacy of a doubtful character, not proved by the evidence so far to be criminal, and open to explanation and to the consideration of various circumstances which may determine its real character.

The 5th article is connected with the 4th, and relates solely to the visits of Mrs. Fraser to the chambers of Mr. B., and alleges various circumstances tending to shew that these visits were for improper purposes, and that adultery was committed on those occasions. I think the true description

Nov. 18. of this article is (save the formal conclusion), that the facts, if proved, would raise a very strong suspicion against Mrs. Fraser. Fraser. Fraser, such as to require from her a very sufficient explanation, without which explanation it would be very difficult, if not impossible, not to conclude that she was guilty.

I will now examine the evidence on this article. Mrs. Arnold is the first witness; she entered Mr. B.'s service at the beginning of December or the end of November, 1840. At the first visit, she states that Mr. Fraser was of the party at Mr. B.'s chambers, so that no inference against Mrs. Fraser can be drawn from that visit; but if the remainder of her evidence be true, it is proof of the whole of the 5th article. Now I do not know that it is worth while to read any part of the evidence of this witness, Mrs. Arnold; but I may, perhaps, refer to one or two passages:—

From a little after Christmas, 1840, Mrs. Fraser became a very constant visitor at Mr. W. B.'s chambers; she came at different hours of the day, but always quite upon the sly; she had her veil down, and was dressed, so far as her outward covering, such as the shawl, was concerned, quite shabby, like a servant, in a kind of black and white whittle, and she came with a gentle single knock. Mr. B. was quite different with her to any body else, for if he could contrive it, when this sort of gentle single knock came, he would get to the door and let her in, although the clerk and I might both be there at the time, which was a thing he never did for any body else, and if either of us did happen to get to the door first, Mr. B. was out in an instant, and popped her into his room. All was done in a way to try and prevent our seeing or knowing who it was; but it was of no use, for it was quite impossible to prevent her being recognized, even though her face might not be seen, for she had an extraordinary waddling kind of walk, just as if she had some time or other been in the habit of carrying milk-pails. But I on many occasions also saw her face, and had plenty of opportunities of recognizing her. On all occasions when Mr. B. and Mrs. Fraser were together, he was very particular in not allowing any person to go into the room, if it could be avoided. He would not even let me go in, but desired me, if I had any thing to take in, to knock at the door, and he would come and take it, and I always did so. When Mrs. Fraser dined there, she generally came about five o'clock; when the dinner arrived, it was brought to the kitchen, and then Mr. B. took it and the tray

into the sitting-room; and, in fact, when Mrs. Fraser was there, he did every thing,—pulled down the blinds, took in the candles, and all. As soon as the dinner was brought, and the tray had been prepared for him, he used generally to send me away, and mostly,—that is, when Mrs. Fraser was there,—ordered me to return at nine o'clock, and bring some oysters, when in season, some stout, and a lemon. I did so, and prepared the things as I had done for dinner, and then he in the same manner came and took them in, and frequently, when she was so there at night, he ordered me to light the bed-room fire. He was uncommon near, and never by any chance had the two fires burning but for Mrs. Fraser. I used also, by his orders, to put the scuttle full of coals, and leave all ready for him to take in. I have no hesitation in deposing that Mr. B. and Mrs. Fraser, on many occasions when so together at the said chambers, committed adultery.

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I say, if this is true, it is conclusive. But before I come to any conclusion as to the evidence of Mrs. Arnold, let me see what evidence there is corroborative of her testimony. There is no other witness examined upon this article at all. I do not say that this alone would induce me, supposing the witness of undoubted credit, to pronounce that this article was not proved, because there might be, in other parts of the case, evidence to support the credibility of her statement. All I at present say is, that before I declare my opinion as to this article, I must pause and consider many other parts of the case.

The 6th article pleads that those visits were continued during the autumn and winter of 1841, throughout 1842, and the early part of 1843; and it expressly pleads that the parties slept together in the chambers on many occasions. Then come two subsidiary facts: 1st, Mrs. Fraser had a cold in 1841, which produced a particular effect upon her voice, and caused her to be recognized at the chambers, if she coughed; 2nd, the finding a cap and apron, and other articles of dress, which had been worn by Mrs. Fraser the evening preceding.

Mrs. Arnold states, on the 6th article, that, from Christmas, 1840, to the summer of 1841, Mrs. Fraser came "very often indeed, and frequently slept in the chambers;" but she has no distinct recollection that Mrs. Fraser slept there

Nov. 18. above once after that time. Now the first observation which necessarily occurs upon reading this evidence is, that the witness expressly confines it to a time not pleaded in the article on which she is examined, namely, to what occurred between Christmas, 1840, and the summer of 1841, whereas the 6th article, upon which she is examined, relates to the autumn and winter of 1841, and afterwards, in 1842 and 1843. The witness then deposes as to the cough, and as to the articles of dress found in the sitting-room, and fixes the period not later than the summer of 1841; all which might have been evidence on the 5th article, but is not, strictly speaking, evidence on the 6th. I do not say that, for this reason alone, I could altogether reject this evidence; but such irregularity in taking the evidence greatly adds to the difficulties of the case, and I must not fail to remember, when I come to draw my conclusions, that the party making this charge has alleged the criminality to have taken place at a time different from that to which the witness has sworn.

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The next transaction to which the witness deposes is when a Mr. Denny came with his children to the chambers; but it goes no further, if all were true, than to prove great familiarity and intimacy between the parties.

In the summer of 1842, this witness (Arnold) deposes in positive terms to circumstances which, if true, would beyond all doubt prove that Mrs. Fraser had slept with Mr. B. in his chambers, and that adultery had been committed. I think it could scarcely be contended that Mrs. Arnold was mistaken as to the identity of Mrs. Fraser: one of the main and most important considerations will be, whether this witness is entitled to full credit. But, before discussing this question, I think it most convenient to look at the further evidence on this article.

Robert Lincoln has been examined on this article: his evidence has not the least reference to it, and ought not to have been taken at all upon this article; so I dismiss it at once. The other witness is Thomas Smithard, whose evidence was taken in the East Indies. He was formerly clerk to Mr. B. from January, 1842, to October, 1843. He deposes to Mrs. Fraser's visits to the chambers of Mr. B., as

any as twenty, as he believes ; that on one occasion Mr. Nov. 18.
 gave him leave to be absent ; that on several occasions, *Fraser v. Fraser.*
 nine o'clock in the morning, he has found the bed-room
 shutters closed, Mr. B. has come out of the room, and he
 has heard "a short, barking cough;" he had often seen and
 heard Mrs. Fraser cough, and the cough in the bed-room
 was like the cough of Mrs. Fraser. Now he does not swear
 that he saw her, or that he thought or was certain it was her
 cough. He says he used to see her going to her husband's
 chambers, and he then deposes to Mrs. Fraser's coming to
 the chambers from the Brighton Railway ; that Mr. B. sent
 him for refreshments, afterwards gave him leave to go away
 for the day, and locked the door after him ; and he speaks
 of Mrs. Fraser's sitting without her shawl and bonnet, and
 of Mr. B. being "much discomposed and heated."

Here, then, are two witnesses, and if Arnold speaks the
 truth, as I have already said, there is an end of the case ;
 and if Smithard speaks the truth—though his evidence is
 by no means so stringent, as he does not identify, save by
 the resemblance of the cough, and even then not even by
 belief, Mrs. Fraser as the person in the bed-room—still, as
 to the general facts, the visits, the witnesses agree, though
 not altogether, as I shall presently shew : indeed, the visits
 of every day are not contrary to the facts admitted in the cause.

Now Mrs. Arnold has no distinct recollection that Mrs.
 Fraser slept in the chambers above once after 1841 ;
 Smithard speaks to the sleeping in 1842. The plea and
 Mrs. Arnold fix the cough to 1841 ; Smithard fixes it in
 1842, and he could not speak to 1841, as he was not in the
 service of Mr. B. at that time. It is true that Mrs. Arnold
 deposes to Mrs. Fraser sleeping at the chambers once in
 1842, and so far the witnesses may be said to agree, though
 there is no proof of its being the same occasion. But
 Arnold swears to the identity not from the cough, which
 she fixes in 1841, according to the plea, but from other cir-
 cumstances. Smithard speaks to the identity solely from
 the cough, which he fixes in 1842, or rather he does not
 speak to the identity, but states the fact of the cough.

These are very minute circumstances, and possibly may

Nov. 18. be capable of reconciliation, for Mrs. Fraser might have had a return of the cough in 1842, and Elizabeth Bound, in her evidence, does speak to Mrs. Fraser being again in some degree affected with a wheezing cough. But this is a case in which it is due to Mrs. Fraser, from the peculiar nature of the whole transaction, that I should examine every thing minutely, and she is entitled to the benefit of all actual discrepancies, unless reconciled by the evidence.

Fraser v. Fraser. This brings me to the discussion of a very important point: am I to conclude, assuming Smithard to speak the truth, that the identity of Mrs. Fraser is established by the resemblance of the cough? I think not, for several reasons. First, the standard of comparison is not in itself of a very certain nature, nor the person giving the evidence likely to be peculiarly competent to form an accurate judgment. Secondly, there is a complete contradiction as to the period when Mrs. Fraser was affected with the cough. Thirdly, this evidence as to identity is most essentially weakened by the admitted fact, that a Miss Lindsay was in the habit of sleeping in the chambers of Mr. B., and consequently the whole of what the witness has said, as to this part of the case, may be true in all respects, except the identity of the person who slept with Mr. B. Lastly, and this is an observation which will apply to other parts of the case, this witness was examined at the trial, before a special jury, and they did not think themselves justified in concluding that the identity was established; for if they did, the result must have been a verdict for Mr. Fraser, though the damages might have been a farthing. I said, at the commencement of my judgment, that, though the verdict at law simply might not be of weight, yet that there were circumstances attendant upon the trial of the action which might be; and I think this is one of them.

I have arrived then at this point: that Mrs. Arnold, as to the chambers, is the only witness to actual adultery, though the evidence of Smithard, as to circumstances, may afford some corroboration of her evidence.

I must next consider the credit due to Mrs. Arnold, and I am bound to consider this point very minutely when the

on turns upon the credit of the witnesses. She was Nov. 18.
 urged upon suspicion of being implicated in the loss of *Fraser. Fraser.*
 ty missing from Mr. B.'s chambers. Of course I do
 esume that she was guilty, but the circumstance of
 scharge has prejudiced, and naturally would preju-
 er against Mr. B., and though this circumstance may
 lude her to go to the full extent of perjury, yet it may
 lice her so as to make her greatly exaggerate in her
 entation of facts. But she admits in her cross-examina-
 pon the 39th interrogatory, that she had told a person
 ' she had known that she was about to leave Mr. B.,
 should not have had any spoons to lose." This is
 that she is a most irritated witness. Looking, how-
 to the whole course of her evidence, I have come to
 nclusion, that I cannot pronounce Mrs. Fraser to be
 on her evidence only—that is, where she deposes to
 guilt. I cannot act upon her testimony unless corro-
 d by circumstances strongly leading to the same
 —circumstances indisputably proved by trustworthy
 ices. By doubtful circumstances—that is, circum-
 s *primd facie* tending to guilt—she is confirmed by
 ard; but Smithard himself is not a witness entitled to
 redit, for he admits an act of dishonesty towards

e result, then, is this: that I shall not consider myself
 ed in believing Arnold's evidence, except, in the exa-
 ion of the further evidence, I shall find some fact to
 ontestably proved by a witness whom I consider en-
 to credit, which fact of itself is evidence of criminal
 ion, and not liable fairly to any other construction.

w I proceed to the consideration of the 8th article,
 pleads that, during the whole period pleaded in the
 ticle, Mrs. Fraser, during her husband's professional
 ces, was in the habit of spending her evenings from

What period is that? The "whole period pleaded
 next preceding article." Why, that is no period at
 e the 7th article relates but to one single occasion in
 ar 1841. I cannot conceive that this is a mistake; and
 t say that, in such important matters, there ought to

Nov. 18. be no mistake as to time. But suppose it is a mistake, and
Fraser. Fraser. suppose I read it "in the preceding articles," leaving out
"next," and adding the plural,—I protest I cannot tell with
any certainty what the period is ; all I can do is to guess :
I may presume that it is the period from December, 1840,
to 1843 ; but this is presumption only.

I now come to the evidence upon this 8th article. Jessie Salter is examined, who was not, and could not be, examined upon the next preceding article. It is all confusion. The evidence which ought to have been taken upon this article, as to the alleged visit to Mrs. Capt. Fraser, is taken upon the 4th article, to which it has no reference whatever. I must say (it is my duty to make the observation), that this careless mode of examining reflects great disgrace on our course of proceeding. The Examiner is bound to know the contents of the plea, and to take the evidence on each article distinctly. As to Jessie Salter's evidence on this 8th article, it amounts to this : that, on certain occasions, when the witness deposes that when Mrs. Fraser went, as she believes, to the chambers of Mr. B., and has been out all night, on two or three occasions, she has seen in Mrs. Fraser's possession a pocket-handkerchief with the name of Mr. B., which Mrs. Fraser said was his, and so declared to the children, and desired them not to tear it.

Now, save this circumstance of the pocket-handkerchief, I want to know what evidence this witness had, what *causa scientiæ*, to justify her in swearing to her belief that Mrs. Fraser went to Mr. B.'s chambers, and passed the night there. None at all, according to her own statement, except the intimacy between Mrs. Fraser and Mr. B. at her own home. The witness was not at the chambers ; she knows nothing of where Mrs. Fraser went, nor how she became possessed of the handkerchief, or any thing of the kind. I find nothing, save the single circumstance of the pocket-handkerchief marked with Mr. B.'s name, to justify her in saying that Mrs. Fraser went to Mr. B.'s chambers and passed the night there, except it was to be inferred from the visits Mrs. Fraser was paying during the intimacy between her and Mr. B. at her (Mrs. Fraser's) house. She knows

nothing of Mr. B.'s chambers, nor where Mrs. Fraser went; she has not one atom of evidence to justify her conclusion, save the intimacy and the pocket-handkerchief, not even if I were to take all she says as to the alleged visit to Mrs. Captain Fraser to be true. Her evidence upon this article comes to nothing whatever, for the pocket-handkerchief might have been left by accident, Mr. B. being a frequent visitor, and it is proved that he was in the habit of playing at blind-man's buff with the children. I cannot presume, from the ordinary circumstance of a pocket-handkerchief being observed in Mrs. Fraser's possession, that this was the accidental disclosure of an illicit connection. The very publicity, according to the witness's statement, and the declaration of Mrs. Fraser herself that it was Mr. B.'s handkerchief, and her desiring the children not to tear it, disprove such inference, which, without them, indeed, could not have been justifiably drawn. One observation, however, does arise, that a witness who will so readily swear to a conclusion of guilt is not to be hastily trusted by the Court in any part of her evidence.

Lincoln's evidence upon this 8th article is wholly unimportant.

Mary Cameron confirms the evidence of Salter as to the absences from home, and especially as to the sleeping at Captain Fraser's, and also as to the handkerchief.

I think it is proved that Mrs. Fraser was frequently absent from home, and, subject to contradiction, occasionally staid out all night, and that these witnesses also depose that they did not know where she went, and yet, though they did not know where she went, and not one has traced her to Mr. B.'s, I do consider that these are circumstances of suspicion not to be lost sight of. If all are true, it is extraordinary that a lady with children at home should so be absent, and none know whither she went; less extraordinary, perhaps, where there were so many near relations close, but still suspicious, and especially so if the story about Mrs. Captain Fraser be true. But the difficulty to be got over is, that all these circumstances are not connected with Mr. B. There is no evidence that I can discover that, upon any

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Nov. 18. one of those occasions, Mrs. Fraser went to Mr. B.'s, or met him.
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The 9th and 10th articles relate to Broadstairs, and to the summer of 1841. Mary Cameron has been examined thereon, and she deposes to Mr. B.'s visit to Broadstairs, and living in the house with Mrs. Fraser, whilst Mr. Fraser was absent; and that Miss Farrer, the governess, was absent during a considerable part of the time whilst Mr. B. was residing with Mrs. Fraser and sleeping under her roof. She negatives, in express terms, all undue familiarity, by which, referring to the whole of her evidence, I presume her to mean, witnessing acts indisputably indicative of improper intention. But she deposes to great intimacy between the parties, and to their sitting alone together until bed-time, when Miss Farrer was absent. But by far the most stringent and direct part of her evidence, and which she would have been justified in classing under undue familiarity, is that Mrs. Fraser's little boy slept in Mr. B.'s bed-room, and that, one morning, Mrs. Fraser, being partly undressed, went into Mr. B.'s bedroom, brought out the little boy, and then returned into Mr. B.'s bed-room. The witness says she thought that this was "very indecent and improper," and most assuredly, if the fact were so, the witness has truly described it. Mr. B. was in bed at the time, and the witness cannot state how long Mrs. Fraser remained. But I have no hesitation in declaring my opinion that, if this witness is deserving of credit, though I might not think this fact absolutely demonstrative of adultery at the time, this evidence ought to have a most material bearing on the whole case, with respect to inferences. I say "the whole case," because, though I examine all these charges separately, and it is my duty to examine all the charges, I well know that my judgment must be ultimately formed upon a consideration of all the facts combined, and therefore I am aware that a fact of this kind may have a bearing much beyond the individual circumstance, and considerably strengthen evidence as to other facts.

This witness is the only one produced to establish this very important circumstance: but it is right to say, that,

supposing it to have occurred, it might have been impossible to have produced any other witness to the fact.

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But how stands this witness when contrasted with the evidence of Miss Emily Farrar, a person who, I think, is entitled to full credit with the Court? Mary Cameron has sworn that Miss Farrar was absent at Ramsgate for a great part of the time Mr. B. was at the house at Broadstairs. In this Cameron is wholly mistaken. Now this is a most important point, for if Miss Farrar, during the entire period, was residing with Mrs. Fraser, the whole story of this witness of the parties sitting alone together at night till they went to bed vanishes at once. Miss Farrar, too, deposes that no undue familiarities of any kind took place. I do not read Miss Farrar's evidence in detail; it negatives Cameron's evidence, with the exception of what she could not know, Mrs. Fraser's going into Mr. B.'s bedroom to fetch the child.

It would not be an unfair construction of Cameron's evidence to say, that probably some transaction of the kind spoken to by Cameron did take place, but not altogether as she has related it. It may have been an act of great familiarity, perhaps, but I doubt if I should be justified in saying, an act of criminal familiarity. However, this is forestalling some of the observations I shall have to make when I inquire into the credit due to this witness.

As to the 10th article, this pleads a letter in supply of proof of an averment in the 9th article, that Mrs. Fraser falsely informed Mr. Fraser that Mr. B. had come down the evening preceding. There is really nothing at all in this; upon any construction I can give to the letter, it is not of the slightest importance. I am at a loss to conceive, even without making reference to the time of putting the letter into the Post, how this can be construed into an improper deception, or any intention of deception at all. It is clear that Mr. Fraser was aware of the whole of the circumstances. I think I may pass on to the next article.

The 11th article relates to what occurred after the confinement of Mrs. Fraser in October, 1841. It pleads that Mr. B. visited her immediately after the confinement, and

Nov. 18. made her many presents; that these visits continued till
Fraser v. Fraser. some time in 1842, and other circumstances occurred whence
adultery is charged in Melcombe Place. Now the first
visits are deposed to by Jessie Salter, and if all true, such
visits, so immediately after the confinement, do certainly
shew an extreme intimacy between the parties. But at
such a period adulterous intercourse could not be supposed
to have taken place. Still the intimacy is, I admit, not an
unimportant fact. The presents relate to cotton stockings
and needlework slippers. Jessie Salter deposes to many
subsequent visits, and of an evening; to their sitting close
to each other; to Mrs. Fraser, upon one occasion, calling
Mr. B. "my dear,"—one occasion. I do not say that this
is not an important fact; but it is not a little singular that
she should not have called Mr. B. by that epithet on other
occasions, and that the witness should only have heard it
once. She speaks of Mrs. Fraser's dress being in "a very
tumbled and disordered state," and says that these visits
were "for the most part" unknown to Mr. Fraser. Now
I wish to pause upon this expression, which is rather im-
portant. It admits that some of the visits were known to
Mr. Fraser. I should like to have learned from the witness
how she knew that some visits were not known to Mr. Fra-
ser, and how she could discriminate between those which
were known and those which were not. If she had said
that some of the visits were known to Mr. Fraser because he
was present, that would have been one thing; but I should
like to have had some explanation from the witness herself.
She adds that the parties were "very guarded" before her.
Adultery, as I said, is pleaded; but this witness does not
draw any such conclusion in her evidence. This is not
unimportant when the witness is a willing witness, as Jessie
Salter unquestionably is. I do not mean to say (for it is
well known that this would be contrary to decided cases)
that it is necessary for the witness to draw a conclusion
one way or the other; for it must be recollected (and Lord
Stowell made the observation*), that if a witness does not

* *Elwes v. Elwes*, 1 Hagg. C. R. 278.

choose to draw a conclusion from facts, the Court is not estopped from drawing a conclusion. But it is a little singular that a willing witness should not draw a conclusion from the facts. However, the evidence of Jessie Salter, if true, would lead very strongly to the conclusion of adultery; so strongly, indeed, that one single act of indecent familiarity would be sufficient to establish the charge.

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Mary Cameron is the next witness. I do not think it necessary to go through the whole of her evidence; the task would be endless. I think it is enough to shew that I have taken it into full consideration. Mary Cameron confirms Salter in all the main points; she says that Mr. B.'s visits were three times a week on an average, and that he mostly dined there; that they sat up late of a night; that, in the day, if any one came in, Mr. B. went into another room; that Mrs. Fraser's hair was much tumbled and disordered, different from what she had ever seen. She negatives having witnessed improper familiarities, and is silent as to the commission of adultery. The substance of her evidence is to shew a very great intimacy between the parties, but nothing of absolute criminality, and she does not give any opinion as to whether adultery was committed or not.

I think it would be impossible to deny that this is very stringent evidence, and goes, though not absolutely, yet very nearly, to reduce the case to a question as to the credit of the witnesses.

The 12th article pleads Mr. Fraser's absenting himself from home in the summer of 1842; Mrs. Fraser's residence at Brighton, and Mr. B.'s visits to her, and the sending out of all the servants during the Sunday night.

A Mrs. Leffen, a laundress at Brighton, has been examined on this article, and I consider it expedient to address my attention to her evidence first; for if admissible and true, she proves an act of indecent familiarity, and any such act clearly proved would turn the scale against Mrs. Fraser. Now not one single word of the circumstance stated in her evidence is pleaded in this article, which alleges specific acts as to Mr. B. alone. The witness knows nothing of Mr. B., though she proves diversity. I entertain the

Nov. 18. *Fraser v. Fraser.* strongest doubt whether the evidence of this witness be admissible at all. I believe (and the cross-examination of the witness proves it), that, when the plea was given in, the evidence of this person was never dreamed of at all; if it had been known, the facts ought to have been specifically pleaded, and the witness might have seen Mr. B., and identified him as the person she saw from her own garden. Mrs. Fraser is not charged with adultery with any other person: there is no opportunity of defence against such evidence on such a plea. But assuming the evidence to be admissible (and I think I am going too far in assuming it), it is impossible that I could safely act upon it, as it is not only the evidence of a single witness, but a witness who sees that which none of the witnesses, with a thousand times greater opportunities, resident in the house, pretend to have seen, and sees such improper familiarity in a room looking to the sea, and into which others might see as well as herself. If her evidence be true, it is next to impossible that the female servants should not have seen more, and if they had, no one can rationally doubt their readiness to state it.

I do not purpose to examine the rest of the evidence on the 12th article in detail, and for this reason: it is precisely of the same character as that given on the 11th, with only a change of place. But I will observe that I cannot take as evidence any thing the child said as to the bathing. It is not evidence in the cause. What the child may have said may lead to a moral conclusion; but it is clear that what was said by the child is no evidence which I can receive. However, if the rest of the evidence is true, it is certainly proved that all the servants were sent out of the way, and that the circumstances deposed to raise a strong *prima facie* case against Mrs. Fraser.

The 13th article, I think, I have in effect sufficiently discussed in my observations upon the testimony of Smithard: he is in effect the only witness to it.

As to the 14th article, and the circumstances which occurred in York Buildings, in 1842, and Mrs. Fraser's confinement in December of that year, the visits of Mr. B., the matter of the old shirt, and the concealment of such

visits ;—all these matters, I admit, are of great importance; but I do not enter into them minutely, because they are *ejusdem generis* with the other facts spoken to by Cameron and Salter, and are unquestionably proved, if they are to be believed, though Cameron can speak only to the first six weeks.

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On this 14th article, however, another witness has been examined, Mary Ann Kendrew. She not only confirms Salter, but speaks to one very important fact, indeed so important that, if I believed it, *cadit quæstio*. She swears that she distinctly heard Mr. B. and Mrs. Fraser kiss each other. She says she is "quite positive about it," and could not be mistaken. This kissing took place when Mr. B. first came in, and before she could shut the door: a very precipitate act unquestionably, and not altogether the most probable, under all the circumstances, especially when I consider that the two other witnesses, Salter and Cameron, have over and over again deposed to the extreme caution of the parties, and their guarded manner. A very audible proceeding it must have been, for I must trust not to the eyes but to the ears of this witness. Kendrew details a great variety of circumstances as to the dress and disorder in the dress of Mrs. Fraser, all tending to raise suspicions of an adulterous intercourse. I will presently examine the credit due to this witness. Mary Raynor also gives similar testimony.

The 15th article pleads the going to Ramsgate in July, 1843, and the occurrence relating to the little girl and the bathing-machine. I do not mean to discuss this last circumstance. If true, and it has not been explained to my satisfaction, the proceeding was grossly indelicate and indecorous: but it bears so remotely upon the question of adultery that I consider it wholly unnecessary to discuss it.

Mary Ann Kendrew is a witness on this 15th article. Amongst other things, she deposes to seeing Mr. B. come out of Mrs. Fraser's bedroom when she was in bed. I need go no further: if I believe Mary Ann Kendrew, this is conclusive. Mary Raynor strongly confirms the intimate intercourse at Ramsgate.

Nov. 18. The remainder of this Allegation relates to the conduct of
Fraser v. Fraser. Mrs. Fraser in avoiding the society of her husband, and making herself disagreeable to him ; to her concealing her residences ; and to his discovery of the alleged adultery, first, by report in July, 1843, and lastly in some way or other in November, 1843, when he had determined to go to India.

It may be necessary to refer to some of these circumstances hereafter ; but the main and important question is, the credit due to the four witnesses,—Salter, Kendrew, Cameron, and Raynor. Their evidence, if admitted and uncontradicted, is decisive of this case, because though by far the greater bulk of the circumstances might by possibility be consistent with innocence and explainable, yet if it be true that Mrs. Fraser was seen coming out of Mr. B.'s bedroom, as sworn by Kendrew ; and if the kissing did take place, as sworn by her, such facts would be conclusive evidence of criminal intention, and if I have proof of criminal intention, I cannot doubt that there are facts which would lead my mind to a conclusion of guilt.

Credit due
to the principal
witnesses.

Now, upon the question of credit, I observe that, when evidence is taken in writing, and the Court has not the opportunity of seeing a witness, it must form its judgment of his credit from the best means in its power, and some of these means are : first, the general tenour of the evidence ; and the general tenour of the evidence of a witness will often make an impression upon the mind of the Court which it is difficult to describe accurately in words. I think every one who hears me, and is conversant with evidence, can hardly read the depositions of a witness without forming in his own mind a conclusion as to the general intention and disposition of the witness to speak the truth to the best of his knowledge. The next means of judging is from specific facts which *per se* affect the credit of a witness. Thirdly, if the case is not supported by other witnesses, who, as may appear, could and ought to have been produced. Lastly, of course, the credit of a witness is destroyed when there is better evidence in direct contradiction, to which the Court would give more implicit credence.

Then, first, with respect to Salter, and the tenour of her evidence. I think it is impossible to read it without being forcibly impressed with the conviction that a very strong prejudice against Mrs. Fraser pervades the whole of it. Her evidence on the 16th article alone creates such a conviction, and it would not be difficult to cite very many other passages. There is not a single circumstance doubtful in itself which she does not construe against Mrs. Fraser. If these circumstances did occur as stated, the conduct of this witness, in continuing to live amidst so much profligacy, is not in itself creditable to her. But the truth is, that the conduct of this witness is inconsistent with her present inferences. I do not think she did believe, at the time of the supposed occurrence of the circumstances, what she says now she believed. She quitted Mrs. Fraser's service in anger, because, as she says, Mrs. Fraser would not permit her child to visit her; and she is in the service of Mr. Fraser. When did he take her into his service? On the 2nd interrogatory she says she entered Mr. Fraser's service on the 15th February, 1844; this was four days before the time of the trial of the Action, she being one of the most important witnesses to establish the fact of adultery. I confess this is a most startling circumstance to me, and I am surprised that Mr. Fraser, belonging to the profession of the law, should have been guilty of so rash a proceeding. This is not all. She has a natural child, and Mr. Fraser receives her with her natural child.

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Again, under the head of credit, it is impossible to pass over her answer to the last interrogatory, the 22nd. The witness declared herself a married woman, and afterwards acknowledges this is not true, and that, never having been married, her child is a natural child. Some excuse must, I think, fairly be made for an anxiety to conceal the fact that she was not a married woman, having deviated from the path of virtue, and for her being unwilling to admit that her child was a natural child. But this witness has shewn, from the previous part of her evidence, that they are all pure fabrications, and I think it clear that she does not view

Nov. 18. with strictness the binding nature of an oath, and the obligation it imposes to speak the truth.
Fraser Fraser.

So much for this witness. I will next notice Mary Cameron, who is the sister of Jessie Salter, and was in the service of Mrs. Fraser from March, 1840, to the end of 1842. I think many of the preceding observations, as to the tenour of her examination, apply to this witness; but there is one of a more particular kind, applying to herself specially; I allude to the direct contradiction given to her by Miss Farrar, as to that lady's absence at Ramsgate. It further appears that she had been discharged by Lady Doyle, the sister of Mrs. Fraser. I do not say that she might not justly have been irritated thereby, but with that question I have nothing to do. But I do say, that the being discharged, justly or unjustly, and more especially the latter, was a circumstance likely to prejudice her against Mrs. Fraser, and I think this feeling is very much shewn in her evidence. This witness, however, in some respects, stands in my judgment higher than Jessie Salter.

And here I must repeat an observation I have already made, with respect to the credit of the witnesses, but which I think particularly applies to the two I have just mentioned; I do not say I lay very great stress upon it, yet it is a circumstance to be considered. These witnesses were examined on the trial at law, and I think they must have been discredited by the jury; for, if not, their verdict must have been the other way. And the jury had an opportunity (of which this Court is most unfortunately deprived) of witnessing the mode in which they gave their evidence.

Mary Ann Kendrew is, as I have already observed, a very important witness, because she speaks to an act decidedly of criminal familiarity. But I have no hesitation in declaring that this witness is most manifestly not a just and impartial witness; that a hostile feeling against Mrs. Fraser is most evident throughout the whole of her deposition. There are many instances of it; I will take only one. She swears that, one night, about three days before Mr. B. came down to Ramsgate, all Mrs. Fraser's hair was disor-

dered and down. She says that this was the only instance, and that being so, she believes it was done on purpose for "a blind." See the *animus* of this witness, who from such a circumstance would draw such a conclusion; and could any one doubt that a witness drawing such an inference must be animated by a most eager desire to support the case against Mrs. Fraser? But is it true what she has stated? It is in evidence from another witness (Raynor) examined by Mr. Fraser, that it was the ordinary custom of Mrs. Fraser to have her hair down and disordered, instead of having it so three days before Mr. B. came down, as a deliberate plot and deception. Be it remembered that some of the other witnesses have sworn to exactly the same effect as Raynor; but whether they had sworn so or not, no one deserving of credit, or not grossly partial, would have sworn to such an inference. This witness's mother is the person who had the care of Jessie Salter's child, and it was at her instance that she went to the attorney of Mr. Fraser. Mary Raynor is another witness whose attendance and evidence on the trial were procured by Jessie Salter, who, whether for truth or falsehood I say not, but in fact, has been a principal mover in procuring all the testimony within her reach. Such proceedings are very suspicious. With respect to Mary Raynor, I think many observations might be made upon her evidence of the same kind as I have made with regard to the three preceding witnesses, though perhaps not with the same strength.

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I have now travelled, at considerable length, through the evidence on the various charges of adultery preferred by Mr. Fraser against his wife;—a very tedious examination it has been, yet the difficulty with me has been to compress my observations—to have multiplied them would have been an infinitely easier task. With one or two slight exceptions,—such as a reference to Miss Farrar's evidence,—I have strictly confined myself to the examination of the evidence produced by Mr. Fraser himself; and my chief reason has been to see how far this evidence has established the charge against Mrs. Fraser, and how far contradictory evidence is necessary or could be given; and I think it right, in this

Conclusion
 from the husband's proofs.

Nov. 18. stage of my judgment, to express my opinion that the proof of adultery at Mr. B.'s chambers fails, because I think the witnesses not entitled to credit, and because I believe Elizabeth Bound, who swears that Mrs. Fraser did not sleep out of her own house, against the evidence of Arnold, that she was accustomed to do so. I believe Elizabeth Bound, and I utterly discredit the evidence of Mrs. Arnold. And with respect to the adultery which the four maid-servants have been produced to prove, I am of opinion that, if they were entitled to implicit credit, the adultery would be proved, because there is superabundantly proved a most intimate intercourse between the parties, and two or three acts which would, if believed, almost necessarily induce the conclusion that the intercourse between Mrs. Fraser and Mr. B., however originally commenced, and innocent at first, must, if all the facts stated were true, have been degraded into a criminal connection. Indeed, if these witnesses were *omni exceptione majores*, effectual contradiction or satisfactory explanation would be next to impossible. I have, however, come to this conclusion, that all these witnesses are of very doubtful credit; to strict veracity and impartiality not one is entitled; I cannot rely with confidence on the testimony of any one of them. At present, I go no further, and I must now consider some of the evidence given on behalf of Mrs. Fraser, which may either convince me that these witnesses are wholly undeserving of credit, or, on the contrary, turn the scale against Mrs. Fraser.

Evidence on
behalf of the
wife.

The first and most important witness as to facts is Elizabeth Bound, still in the service of Mrs. Fraser, in which she has been since July, 1839. I will here observe that I shall abstain from noticing any part of the evidence which does not bear upon the question of adultery. It is my province to judge of this only, and I have nothing to do with the conduct of either party except as connected with this question.

It is a part of the admitted history of this case that Mr. B. was Mr. Fraser's friend, and by him introduced to Mrs. Fraser; and the witness Bound accounts for Mr. B.'s dining alone with Mrs. Fraser at one period, on some occasions,

by Mr. Fraser's absenting himself, though he had invited Mr. B. She contradicts the assertion that Mrs. Fraser was accustomed to come home of an evening alone. She states that Mrs. Fraser slept for three or four nights at Lady Hayes'; but she denies that she slept out on any other occasion, and she confirms Miss Farrar's evidence as to Broadstairs; and very important this evidence is, because the effect of it is, that it falsifies the evidence of one of the most material witnesses on the other side, as to Mrs. Fraser and Mr. B. sitting up alone, and tends to shew that the other witnesses have sworn not only falsely, but wilfully so. Again, as to the visits in town; Elizabeth Bound answered the door, and shewed Mr. B. into the drawing-room, as other visitors were; she contradicts the other witnesses as to Brighton, and she explains the visit of Mr. B. in December, 1842. On her cross-examination (if it were necessary to go through it) the witness has contradicted many other matters stated by Mr. Fraser's witnesses, which could not have come out on the plea, but only in answer to the interrogatories. As to the credit of this witness, I do not forget that she has been, throughout a long period, in the service of Mrs. Fraser, and that her bias leans decidedly towards her mistress; but I also think that she has given her evidence in a more credible manner than the other servants: and I will observe, in justification of this opinion, that she does not, in her examination in chief, attempt to depose, as forward witnesses are apt to do, to the whole plea, but frequently declares her inability to give evidence, or declines so to do, because she has not a knowledge of the circumstances. In one respect she is contradicted by Higgs, as to the night at Brighton, with regard to his being with her and the other servants. But I cannot consider this to be a proof of wilful false swearing, for she has fully admitted all her acquaintance with Higgs (perhaps blameable), and has stated many circumstances which it is abundantly clear, if it were not for a due regard to her oath, she would naturally have wished to conceal, and would have concealed. She is also mistaken as to the time Mr. B. was at Broadstairs; but, after such a length of time, she was likely to be mistaken. In

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Fraser v. Fraser.

Nov. 18. some respects she is a singularly candid witness : for instance, she admits Miss Fraser's dislike of Mr. B. after the *Fraser-Fraser*. bathing at Ramsgate.

I need not go through the evidence of Miss Emily Farrar; I have already adverted to it, but I will repeat my conviction that her testimony, coupled with that of Elizabeth Bound, has not only disproved the accounts given by the two servants of what occurred at Broadstairs, but has gone a considerable way to shake my confidence in any part of their statements.

I have expended a very short time upon the evidence produced on behalf of Mrs. Fraser, but I do believe, nevertheless, that, with the exception of the evidence of Mr. B., I have exhausted the whole subject. I am not aware that there is any other evidence which bears directly upon the question of adultery, except that of Mr. B.; with that single exception, the whole of the remaining evidence has so remote a connection with the case (indeed, none at all), that I shall not uselessly and vainly occupy time in the discussion of it. Now let me verify these observations. I am not here to judge whether the matrimonial cohabitation of Mr. and Mrs. Fraser was happy or otherwise; nor whether he was a negligent and careless husband, or she a provoking and jealous wife; I have nothing to do with family quarrels, except so far as the behaviour of either party may contribute some proof to the establishment of an adulterous connection. It is true, that when dislike of a husband and attachment to another man are coeval, the dislike shewn of the husband may deserve consideration as one of the effects, and consequently proofs, of an improper attachment. But nothing can be more clear than that this is not the present case, for the evidence on both sides establishes to my perfect satisfaction that these domestic broils, these jealousies and these neglects, all flourished with equal vigour before the introduction of Mr. B., and just as much, as afterwards. What better evidence can I have of the truth of this observation than the letter, dated July 8th, 1842, written and produced by Mr. Fraser himself? Though why or wherefore he produced the letter annexed to the interrogatories,

is completely beyond my comprehension ; and there are a number of exhibits annexed to the interrogatories without any information as to the purpose for which they were intended. I find a letter in his handwriting, and not a single circumstance in it which is evidence for him. What evidence does it contain against him? Every thing he utters is evidence against him. I have looked at this letter, dated the 6th July, 1842, for the purpose of seeing what evidence it affords. In this document Mr. Fraser details his domestic grievances and quarrels, from the very date of his marriage down to the day of their separation, in May, 1842. There is not one atom of credible evidence to prove that, after the introduction of Mr. B., there was any essential change in Mrs. Fraser's conduct, from which it would be possible to draw any inference of the commencement of an improper attachment. I forbear, therefore, to intermeddle with the mass of matters which have nothing to do with the present inquiry. For the same reason, and on the same principle, I have nothing to do with the advance of the £200. It certainly was advanced after Mr. Fraser had instituted inquiries as to his wife's conduct ; but whether at a period when he continued to entertain suspicions, or had temporarily abandoned them, is not so clear. But how can the fact bear on this case? Why, only thus : it is to be supposed that he would not take the money from a wife he deemed unfaithful. I could build no conclusion on such suppositions with any safety. In the same way I dispose of all the evidence as to the denial of the £20, and the sale of the furniture ; I dismiss these with all the other irrelevant matters with which this case is overloaded.

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A very important matter, however, still remains untouched ; I refer to the evidence of Mr. B. It is not usual in these Courts to produce as a witness for the wife the person accused of having committed adultery with her. But such person is a competent witness, and one or two cases have occurred in which reliance has been placed on such testimony ; as in *Gill v. Gill*.* On general principles, how-

Testimony of
the alleged pa-
ramour.

* *Archers, E. T., 1823. Not rep.*

Nov. 18. *Fraser v. Fraser.* ever, such evidence must be received with very great caution. In the case of ordinary witnesses, who have no interest or personal connection or special motive to induce them to swear falsely, it must be presumed that, having a horror of committing the crime of perjury, they will speak the truth; but where a person in the situation of Mr. B. is examined, if really the connection has taken place, there is a tie of honour, false or true, which, so long as human nature remains unchanged, may conflict with the principle of duty, and, added to this false principle of honour, in many cases, there is a feeling of self-interest, and a desire to be relieved from the burthen of the connection, by denying its existence. For these reasons, on general principles, independently of any particular reference to Mr. B., all such evidence must be watched with extraordinary vigilance; and I agree with the Counsel for Mr. Fraser, that the evidence of a person so circumstanced cannot be put into competition with the proof of facts directly leading to adultery; but I must add this qualification: provided such proof comes from perfectly credible witnesses. It is difficult, perhaps impossible, accurately to balance the force of these conflicting motives upon a mind so circumstanced; but I think that, where the witnesses in support of the charge are not wholly free from suspicion, the Court would be justified in giving some weight to the evidence of the alleged paramour. In such a case there is less reason to suppose perjury, because the guilt is more doubtful. All I can add is, that Mrs. Fraser is entitled to the benefit, such as it is, and with all the drawbacks I have mentioned, of the oath of Mr. B. to her innocence, and of the presumption that the sense of the crime of perjury would overcome all other considerations, and induce him to speak the truth. How far I shall have occasion to use Mr. B.'s evidence for the foundation of my judgment will presently appear: I mean not, however, to examine his evidence in any detail, and for this obvious reason: that the whole value of it depends upon his credit; and there is nothing in the manner of giving his evidence which enables me to judge with safety as to the veracity of the witness. It is either all true, or it is manifest per-

jury. If true, when he negatives all guilty connection, all the rest is unimportant; if false, all the truth he may have told in other respects is useless. I cannot discover in this mass of evidence any thing so contradictory as on that account to discredit Mr. B.; neither could I, on the other hand, in such a case and with such a witness, trust much to mere consistency as a proof or test of truth.

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I have now examined all the evidence which I think it necessary to discuss before arriving at my conclusion. I am of opinion that the charge of adultery preferred against Mrs. Fraser is not established by the evidence produced, and I am of that opinion, first, because I cannot credit the witnesses who have deposed to it; because they have deposed throughout with manifest bias; because they are not supported by any witness of undoubted credit; because no person in whom I can place sufficient trust has confirmed them; because no trustworthy witness has deposed to any act of criminal familiarity; because I think, and am convinced, there has been a species of combination, at the head of which is Jessie Salter, a servant living with Mr. Fraser, who had taken her into his service at the time of the trial,—a course of proceeding which strongly tends to sap the very foundation of truth and justice; because in some, and those important respects, the evidence produced by Mr. Fraser is contradicted by testimony much more deserving of belief; because from the evidence of the most credible witnesses there is nothing in Mrs. Fraser's conduct to lay a probable foundation for guilt; and because the introduction of Mr. B. by Mr. Fraser, and Mr. Fraser's subsequent conduct, lay a rational foundation for an intimacy between Mrs. Fraser and Mr. B. of an innocent nature. In acquitting Mrs. Fraser of guilt, I do not feel it necessary to rely upon the testimony of Mr. B. I cannot, however, refrain from observing that, though I absolve her from the charge of criminal intercourse, I cannot acquit her of very gross imprudence. Whatever might have been the conduct of Mr. Fraser, whatever her own difficulties (which were not small), she ought not to have allowed the intimacy to exist in the degree proved and to some extent admitted. By acting on impulse, by want

Conclusion—
charge against
the wife not
established.

Nov. 15. *Fraser v. Fraser.* of caution and want of firmness of mind, and, if forced to seek advice, in not consulting her relations and friends, and those most competent to advise her (and none were more competent than Mr. Broughton), and by resorting exclusively to Mr. B. for counsel and assistance in her difficulties,—though I think she is not guilty, she has perilled her reputation and all that should be most dear to her. Of this intimacy, short of criminality, no person has less reason to complain than Mr. Fraser, for he first abandons all his own duties, and, under false pretences, and for criminal purposes, absents himself from his wife and family; then introduces his friend, encourages the acquaintance and intimacy, and leaves the result to take its chance, though it might be destructive of his own honour and the peace and happiness of his wife. It is true that there is evidence that, from temper and error in judgment, Mrs. Fraser may not have rendered his home so happy as it might have been; it may be that, at times, Mrs. Fraser may have been unreasonably jealous; but for jealousy and distrust the evidence proves she had the amplest cause,—proved now beyond all rational doubt, though, in his letter of July, 1842, Mr. Fraser challenges inquiry as to the purity of his own conduct, when he had for weeks and months together been carrying on an adulterous intercourse with Harriet Edwards, at Greenwich and elsewhere.

Decree in favour of the wife. Being so, I at least have discharged my painful duty with as much clearness and in as small a compass as in my power, looking at the bulk of the matter. I decree that Mrs. Fraser has proved her charge against Mr. Fraser; that he has failed to establish his Allegation, and that she is entitled to be separated from him.

Proctors:—*Bowdler*, for the wife; *Bayford*, for the husband.

Archers Court of Canterbury.

NOVEMBER 19.

3rd Sess.

MORSE v. MORSE.—*Motion.*—This was originally a suit for divorce by reason of adultery by Mrs. Morse against the Rev. Mr. Morse, her husband, in which the Court pronounced the sentence of separation prayed by the wife. The costs and alimony for two years being unpaid, on the 12th February last, a Monition was taken out, but could not be personally served upon Mr. Morse, who was residing beyond the seas, and it was returned on the 1st June. A Monition by ways and means was then decreed, which could be served in no other form than on the church-door of Mr. Morse's rectory, and on his Proctor. No appearance being given for Mr. Morse,

Practice.—Costs and alimony, decreed in a matrimonial suit, not being paid by the husband, who had gone to reside beyond sea, the Court pronounced him in contempt, and decreed the same to be signified, in order to sequestration, under the 2 & 3 W. 4, c. 4, without personal service of the Monition. Nov. 10.

Haggard, Dr., moved the Court to pronounce him in contempt, in order that it might be signified to the Court of Chancery for a sequestration of his living, under the 2 & 3 W. 4, c. 4. There is no doubt that Mr. Morse is aware of the proceeding, as appears by a letter from him, acknowledging that he had received the bill of costs.

PER CURIAM.—Let the case stand over till the next Court-day, in order to ascertain whether personal service has ever been dispensed with.

SIR H. JENNER FUST.—I see no distinction between this case and that of *Greenhill v. Greenhill*,* in which the Judge of the Consistory Court of London considered that the party might be pronounced in contempt for the purpose of sequestrating his estate under the 2 & 3 W. 4, c. 4. Acquiescing entirely in the view taken by that learned Judge, I am bound to pronounce the party contumacious, and to decree his contempt to be signified to the Court of Chancery, in order to the profits of his living being sequestrated.

Nov. 19.
JUDGMENT.

Motion granted.

Proctors:—*Tebbs*, for the wife; *Bayford*, for the husband.

* 1 Curt. 462.

High Court of Admiralty.

3rd Sess.

NOVEMBER 21.

Collision. — **THE "ATLAS."**—*Cause, by Act on Petition.*—This was a cause of damage by the owners of the Austrian polacca brig *Piccolo Oscar*, of Trieste, which was moored in Falmouth harbour on the 24th of February last, when the British brig *Atlas*, having a duly-licensed pilot on board, made preparations for anchoring in her neighbourhood, but, through some mismanagement, she came in collision with the foreign vessel, and caused her so much damage that she was obliged to be run on shore and unladen. As the occurrence took place at noon, and the weather was moderate (though the wind blew strongly from the S.W.), the plea of inevitable accident was precluded, and, as the foreign vessel was stationary, she could not be in fault. The misconduct, therefore, was admitted to rest with the *Atlas*; and the only question was, whether the blame was to be attributed solely to the pilot (in which case the owners were exempted from liability by the Statute); or whether the master and crew of the *Atlas* participated in the neglect or default which occasioned the accident. The crew of this ship, in their affidavit, affirmed that the orders of the pilot were duly and promptly obeyed; whereas the pilot, in his affidavit, declared that he ordered the anchor to be let go in ample time, but that the "nervousness" of the seaman placed over the anchor had delayed the operation and caused the accident. The action was entered at £1,000.

The Court was assisted by Trinity Masters.*

Bayford and *R. Phillimore*, Drs., were for the foreign owner; and *Addams* and *Robinson*, Drs., for the *Atlas*.

SUMMING UP.

DR. LUSHINGTON (addressing the Trinity Masters).—Gentlemen, in this case I must draw your attention very particularly to some of the circumstances attendant upon it;

* Captain Nelson and Captain Farquharson.

and I conceive that it is a case certainly not divested of difficulty. There is not a shadow of doubt that the damage was occasioned by the act of some person or other on board the English vessel ; namely, by the default, or negligence, or incapacity of the pilot, or by the negligence or default of the crew, for there was no one circumstance arising from the wind or weather which could rationally account for this collision, except through a fault or failure somewhere. Now, according to the ordinary principles of justice, the owners of this Austrian vessel would be entitled to relief for the damage done to their vessel from some person or other. Whether, according to the peculiar law of this country, for other and different purposes, the owners of this vessel may be without remedy, we are not to consider ; all we have to do is, to consider what are the facts, and, of course, the legal consequences must follow from that state of facts. This being so, the owners of the Austrian vessel proceed in this Court by the arrest of the *Atlas*, to make good the damage ; and *prima facie*, without reference to the fact of there being a pilot on board, the owners of the British vessel would be bound to make good the loss.

As to the mode in which the cause has been conducted, my opinion is, that the owners of the *Piccolo Oscar* had a right to bring forward their case as they have done. They have brought it by simply stating that the vessel was properly moored ; that the British vessel came into the harbour, and for some reason or other, the collision occurred,—it was not for them to state how the damage was done ; that the damage was not occasioned by the wind and weather, nor the result of inevitable accident, but must have been the result of negligence on the part of some person or other on board the British vessel. The answer ought to have been, to admit that the damage was done by neglect, and to allege that that was the neglect of the pilot, and not the *laches* of the crew ; and if the answer had been put in that shape, the affidavits might have been taken immediately, and the point at issue decided. I repeat distinctly what I have said in former cases, and one of them went up to the Privy Council, and the opinion I gave was not overruled, that where it is an

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Atlas.

Mode of proceeding in this case.

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Atlas.

admitted fact that the damage has been done by a vessel having a pilot on board, it is her duty to shew that the damage was occasioned not by the default or neglect of her own crew, but "from or by reason or means of some neglect, default, incompetency, or incapacity of the licensed pilot."* And I say so for two reasons; first, according to every dictate of common sense: in this case, the persons on board the Austrian vessel could not know, with any accuracy, what was done on board the *Atlas*; whereas, those on board the *Atlas* must or ought to know whether the collision arose from the default of the pilot, or of the crew. They ought to have stated it, and upon them is the burden of proof, and it is common sense to throw the burden of proof upon those who have the evidence in their own power, and not upon those who by no possibility could know the truth. And not only is this agreeable to the dictates of common sense, but according to the rules and principles of evidence, as determined so long ago as in the case of Lord Macclesfield's trial, and continued up to the present day.

The point
in question :
whether the
crew of the
Atlas were in
fault.

This being so, I put the case to you thus : Have or have not the owners of the *Atlas* established to your satisfaction, that this collision did not arise from any default of their own crew? I admit there are difficulties in this case, for this reason : the probability lies either way ; it is just as consistent with probability that the pilot should discharge his duty with propriety as the crew ; and it is just as consistent with probability that either party should neglect his duty, for we are not to presume that any party, in his own sphere, is guilty of negligence, till it be proved. We know that, on a trial of a different description, the probability would be in favour of a man's skill and competency, which properly belong to the profession of which he is a member. We have, therefore, no probability either on the one side or on the other, and we must come to the circumstances of the case, which are simply these : on the one hand, it is alleged (by the owners of the Austrian vessel) that the pilot gave the order in time for letting the anchor drop, and the crew disobeyed it ; on the other hand, this is

* 6 Geo. 4, c. 125, s. 55.

distinctly denied, and it is alleged and insisted upon, that his order was given when the vessels were 200 fathoms apart. It will be for you to decide whether there is any thing in this peculiar distance which will throw light upon this question. But it is right that I should tell you here is but the single evidence of the pilot to throw the blame upon the crew; and that he is subject to all those imputations upon his veracity which have been so strongly urged by Dr. Addams and Dr. Robinson. He may, perhaps, be liable to an action; he may be liable to the forfeiture of his bond; he may be liable to dismissal; therefore, he has the strongest possible reasons to speak in excuse of himself. But again, on the other hand, the master and crew of the vessel are in but a very little better position; for it is their interest to swear that they were not to blame. And, therefore, it is very difficult to say, *à priori*, there is any great preponderance on the one side or on the other. On the one side there is but one witness, and on the other there are a great many; and it is not easy to suppose not only that the order was given, but that it was repeated in loud terms. As to a general denial that any such order was given, it is a denial of the whole thing; it is no mistake, but perjury, supposing it to be false.

Therefore, the question I shall put to you is this:—Are you of opinion, on a view of all the circumstances of this case, that the master and crew of the *Atlas* were not to blame?

(After consultation.)

DR. LUSHINGTON.—On the first question in this case there neither has been, nor could be, any controversy, namely, that the damage done to the Austrian vessel was the result of the negligence or incapacity of some person on board the *Atlas*. Upon the second point, the gentlemen by whom I am assisted are of opinion that some blame was imputable to the pilot. With respect to the third point, whether the master or any of the crew on the *Atlas* shared in that culpability or not, we are all of opinion that there is not enough evidence to enable us to fix on them any blame.

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Atlas.

OPINION AND
JUDGMENT.

Blame im-
putable to the
pilot alone.

Nov. 21. I have already decided that the Act is fully applicable to foreign ships. I must dismiss the suit, but I shall give no costs.
Atlas.

Proctors:—*Deacon*, for the foreign owner; *F. Clarkson*, for the *Atlas*.

Prerogative Court of Canterbury.

3rd Sess.

NOVEMBER 24.

Practice. — **IN THE GOODS OF THE REV. JAMES CURREY, DEC.—**
 Where a testator died in 1823, and no step was taken to prove his will till 1846, and in the mean time an administration had been obtained limited to his interest in the remainders of two Terms, on an allegation that he was dead intestate, without citation of or renunciation by the parties entitled to the general grant; the Court refused a *ceterorum* probate to the sole executrix, and stopped the practice of making such grants without citation.

Motion, ex-parte.—The deceased died 8th August, 1823, leaving a will, whereof M. C., his relict, was appointed sole executrix. The property was of such a nature that probate of the will was not required till it became necessary to insure the validity of an appointment, and it was not till August, 1846, that the executrix was sworn for the purpose of obtaining probate. Previously, however, to the grant being completed, it was discovered that, in May, 1829, Letters of Administration had been granted to T. G. N. (nominee of J. M. F. and J. C.), limited to the deceased's interest as trustee in the remainders of two Terms, of 199 years and 499 years, respectively, in certain premises in the county of Essex, in which Terms, so far as related to the aforesaid property, J. M. F. and J. C. had the sole equitable interest. More than twelve months from the deceased's death having elapsed, this Administration had issued, according to the practice of the Office, without the citation or renunciation of the parties interested in the general grant, and consequently without the knowledge of the executrix, and in it the deceased was recited to have died intestate. The executrix, under these circumstances, was now desirous of obtaining probate of the will limited as to the rest of the goods of the deceased (except the above-named Terms), and wished to do so without calling in the Administration, being unwilling, after so long an interval, to disturb any acts done under it.

Deane, Dr., moved accordingly. The grant of a *cæterorum* probate, after a limited Administration to assign a Term, is agreeable to the case of *Re John Savory*;* and in *Harris v. Milburn*,† probate issued after a limited Administration. Nov. 24.
Currey, dec.
Nov. 6.
MOTION.

PER CURIAM.—There had been a citation of the next of kin in that case; here there has been no citation. The administration has been erroneously granted on a statement that the deceased had died intestate, and twenty-three years after the deceased's death, application is made, for the first time, for probate of his will, after lying by so long. I should advise the party to consider whether an assignment under a *cæterorum* grant would be a valid assignment. The widow is entitled to a grant; the only question is, in what form; whether a *cæterorum* grant, or a general probate.

(The case accordingly stood over.)

The motion was repeated.

Nov. 24.

Deane.—The form in which the grant is now asked seems to be the most convenient for all parties. [PER CURIAM.—That is the difficulty I have, whether it is most convenient for all parties. You want a *cæterorum* grant, in the face of an administration granted on the ground of the deceased's having died intestate.] Besides the cases of *Harris v. Milburn* and *Re Savory*, there is the case of *Re William Bell*,‡ in which an administration passed limited to a certain Term of years, the deceased being erroneously therein recited to have died a widower; and in the recital of his relations, one of his children was omitted to be mentioned. Both the

* Not rep. In this case, the deceased died in 1831, leaving a will, dated 1828, appointing his wife and sons executors, and his wife residuary legatee, who, however, died in the testator's lifetime. There was no necessity for taking probate of the will until 1838, when, upon the renunciation of the executors, an Administration was granted, limited to a Term vested in the deceased. In Michaelmas Term, 1845, the Court, on *ex-parte* motion, allowed one of the executors to retract his renunciation, and granted him a *cæterorum* probate, observing, "There has been no general grant." Oct. 11.
Nov. 7.

† 2 Hagg. E. R., 62.

‡ Not rep. In this case, the first administration passed in October, 1840, and the second was decreed on motion on the Bye-Day after Hilary Feb. Term, 1846.

Nov. 24.
Currey, dec.

errors were discovered previously to the second administration, which was directed to pass limited to certain trust-property, the errors in the former grant being noted in the entry in the Act-Book of the last administration, and in the records relating to it. In *Re Savory*, the executor was allowed to retract his renunciation of the executorship, and to take a *cæterorum* grant, without calling in the limited administration, or communicating with the parties interested under it. The fact that, in that case, the renunciation by proxy of the executorship preceded the grant of administration, can hardly create a difference between that case and this. [PER CURIAM.—Can I allow an executor to renounce a part of the execution of a will? He has the *universum jus*; he is the executor of the whole will. I am anxious to stop the practice, as a very erroneous one, of making these grants without citation. Parties may be ignorant of a deceased having made a will, but they cannot be ignorant of his having some relations; if he has none, the Crown would have an interest in the property. I cannot see my way to the making a grant in this case.] The executrix applies for this grant, according to the practice of the Office, being unwilling to create alarm and expense by calling in the former limited administration, or citing the parties interested under it; she, therefore, in applying for this form of probate, foregoes all claim to administration of the Terms comprised in the limited administration, and leaves to the assignment under that grant whatever validity it originally had.

PER CUR.

SIR H. JENNER FUST.—If I were to make a *cæterorum* grant, I should grant less than the party is entitled to, and the Terms assigned under an irregular grant, made upon an allegation that the party was dead intestate, would be null and void. I want to know the views and wishes of the persons to whom the Terms are assigned: what do they say to such a grant? I feel great difficulty in acceding to the motion, and I think that the Court should stop such an irregular practice as that of granting administration for the assignment of Terms without citing the next of kin, under

a mere allegation of the party deceased being dead intestate. [*The Registrar*.—In this case, the Calendar was searched from the time of the deceased's death, and, no will being found, the impression was that there was no will.] That is not a justification of the practice; the next of kin ought to have been cited.

Motion rejected.

Moore, Proctor.

Nov. 24.

Currey, dec.

IN THE GOODS OF ALEXANDER SKAIR, DEC.—*Motion, ex-parte*.—The deceased died in November, 1846, having made a will, dated 16th May, 1845, with a codicil, dated 29th October, 1845. By his will, *inter alia*, he bequeaths as follows: "I give and bequeath all the furniture, plate, china, glass, linen, books, pictures, wearing-apparel, jewels and ornaments, wine and other liquors, in and about my house at Camden Town, or such other dwelling-house as I shall hold or occupy at my death, to my nephew, the said W. S., except such articles as shall or may be mentioned in a Memorandum made or to be made by me in favour of Ann and Elizabeth Robinson, hereinafter named, and which articles I consider as given to them in my lifetime." The will and codicil were found sealed up in an envelope, in the iron chest in which the testator kept his papers of moment and concern, by two of the executors, who, on reading the above clause in the will, made a careful inspection of the papers in the chest, but could find no paper answering to the Memorandum referred to. They subsequently made a most minute search amongst the deceased's effects and papers, and ultimately found, in an old pocket-book, in a drawer, in a small cabinet, in the drawing-room, a paper or Memorandum, entirely in the deceased's handwriting, which contains the following clause: "Camden Town, 12th July, 1843. Memorandum. I have this day made a present to Ann and Elizabeth Robinson of the piano-forte and stool, and as much furniture as will fit out one sitting-room, two bed-rooms, and kitchen requisites to match; either the parlour or drawing-room little sideboard, at the selection of

A testator having, in his will of 1845, referred to "a Memorandum made or to be made," as containing gifts to A. and E. R., and a paper, headed "Memorandum," dated 1843, specifying gifts to A. and E. R., *ejusdem generis*, in the testator's handwriting, being found in an old pocket-book belonging to him:—Held, that the paper was not sufficiently identified to be pronounced for as part of the will, on motion.

Nov. 24.
Skair, dec.

Mr. James Henderson ; six silver table and as many dessert spoons each, six forks each, table and dessert, and one gravy-spoon, all my books, and such other requisites Mr. H. may think necessary to furnish respectably two floors." The testator then goes on, in continuation, to state that, in return for this gift, he expects the said Ann and Elizabeth Robinson to educate a little girl, named E. S. B., and then signs his name at the bottom of the side, and upon the other side he states that £125, clear of legacy duty, should be invested for the benefit of another child, who died in the deceased's lifetime. No other paper in any way answering to the description in the will could be found, and none was produced by the testator at the time of executing the will.

MOTION.

Jenner, Dr., moved for probate of the will and codicil, and also that part of the Memorandum ending "to furnish respectably two floors," as forming part of the will.

DECREE.

SIR H. JENNER FUST.—Probate is asked of only part of the Memorandum of the 12th July, 1843 ; but the paper goes on to annex to the gift contained in that part a condition : "In return for this liberality, and my general behaviour towards them, I expect they will take and educate the little girl E. S. B., named and provided for in my will, if my executors approve of their so doing ; said executors paying a moderate sum for her board and education, they behaving to her, and watching over her welfare, as if she were their own sister." And then, after directing that a sum of £125 be paid to Mrs. J.'s child, on her attaining twenty-one, and should she die before that period, that the said sum should form part of his estate, the deceased concludes : "Though the above may not be legally witnessed, as already appropriated, I expect it will be honourably and truly fulfilled, according to my intentions." Now it is clear that this paper, being unattested, can have no effect of itself, and in order to be incorporated into the will, it must be identified beyond all doubt. But the Court is of opinion that it is not *prima facie* so identified as the paper referred to in the will as to be entitled to probate as part of the will, and if the parties think otherwise, they must propound it. I

do not think it is so clearly identified as to justify the Court in pronouncing for it as part of the will, upon *ex-parte* motion; and the more so as the deceased refers to "a Memorandum made or to be made." I am, therefore, of opinion that I must reject the motion, and leave the parties to propound the paper.

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*Shair, dec.*Motion re-
jected.*Puckle, Proctor.*

Court of the Dean and Chapter of St. Paul's.

NOVEMBER 25.

KING v. KING.—Allegation.—Answers.—This was a suit for a divorce by reason of cruelty and adultery, by Mrs. Maria King against Mr. James King, her husband. A Libel and Additional Articles had been admitted, as well as a Responsive Allegation of the husband, retorting the charge of adultery. A further Allegation was now offered by the wife, the admission of which was opposed, but, with the exception of one Article, it was admitted by the Court.

The Answers of the wife to the husband's Allegation were then objected to.

Addams, Dr., for the husband.—The personal Answers of the wife were not called for, and it is not competent to her to bring in Answers, not called for, to those parts of the Plea which charge her with criminality. But if she chooses to answer, she ought to answer to the whole; whereas she omits to answer some articles altogether, and, swearing generally that she did not commit adultery, she says nothing as to the specific averments of time and place, her Answers to which, if false, could alone support an indictment for perjury.

Bayford, Dr., on the same side.—If the wife desires to

Practice. — In a suit for divorce by the wife, by reason of cruelty and adultery, where the wife, being charged with adultery, chooses to give, uncalled for, her personal Answers to such charge, the Court has no power to exclude them, or to compel her to answer fully.

ARGUMENT.

Nov. 25. give her Answers, she must answer in conformity with the rules applicable to other persons, and make them full.
King v. King.

R. Phillimore, Dr., contra.—No authority or analogy at Common Law has been cited to shew that, if the wife answers such charges at all, she must answer every one; authority and reason are the other way. She need not answer any of the articles, and might withdraw all her Answers as to the charge of adultery even now. With respect to some of the articles, Mrs. King was of opinion that she could give her Answers in such a way as would clear herself; and as to others, the truth was so much mixed up with what was false, that the attempt to separate them and explain the matters would make the Answers so long, that she thought it best to stand upon her privilege, and answer not in detail, but in gross. Redundant Answers are objectionable. *Oliver v. Heathcote*.*

Twiss, Dr., on the same side.—We are at liberty to answer to the charge of adultery at our own discretion, and the Court has no authority to compel us to answer more fully.†

JUDGMENT.

DR. PHILLIMORE.—The wife in this case has brought charges of cruelty and adultery against her husband, who, in his Plea, denies both, and sets up a charge of adultery against the wife; and the question is, as to the admission of the Answers of the wife to the husband's Allegation responsive to the original Plea. I do not apprehend that her Answers could be called for to a charge of adultery, but the wife presses her Answers, and as to some of these criminal charges, she denies them on oath; and as to others, she does not answer, or evades answering; and the question for the Court is, whether the wife can bring forward her Answers in this way, denying some of the charges and omitting others. It is said, I ought to compel the wife to answer the whole, and that she is not at liberty to recede from those

* 2 Add. 35.

† By 13 Car. 2, c. 12, s. 4, no ecclesiastical judge or officer may administer any oath whereby a party is compelled to confess, or accuse himself of, any criminal matter rendering him liable to censure or punishment.

which she has omitted to answer. But the law prohibits me from forcing the party to purge herself upon oath of a criminal charge. I have no authority for excluding any one from the opportunity of denying a charge of adultery upon oath, if he chooses to do so; but it is a very inconvenient practice, and no prejudice can arise to any person who does not take such oath, for it is his privilege not to be required to do so, and it would be no privilege if any prejudice arose from his declining. Therefore, Mrs. King will not sustain any prejudice by not denying the charges upon oath. As to some of these Answers, I should think it necessary, if pressed, to direct some alterations; but, under the circumstances, it appears to me the best course to send the Answers back for the reconsideration of Counsel, and in the course of their reconsideration of the articles (the 5th and 6th) which require reformation, to determine whether it would not be better to withdraw the Answers on oath to the charge of adultery. I have not any power to compel the party to answer those parts of the charge which she has not answered; and it is more consistent with modern practice not to press these Answers. Counsel might point out to their client that it is not to her advantage to persist, and that by the denial on oath of these charges she will not put herself in a better condition.

Nov. 25.
King v. King.

The party
cannot be com-
pelled to an-
swer fully.

Proctors :—*Townsend*, for the wife; *Rothery*, for the husband.

High Court of Admiralty.

NOVEMBER 27.

Add. Court Day.

THE "SERINGAPATAM."—*Cause, by Act on Petition.*—Collision.—This was a cause of damage, by the owners of the Danish barque *Harriet*, of 445 tons, against the *Seringapatam*, a British ship of 870 tons, which arose from a collision between the two vessels on the night of the 26th of April last, a few miles
Construction and application of the Trinity-House Rule where two sail-ing-vessels are

Nov. 27. to the westward of Beachy Head. The *Harriet* was on a voyage from St. Croix, in the West Indies, to Copenhagen, with a valuable cargo of sugar and colonial produce; the *Seringapatam* was coming down the Channel from London, bound to Calcutta, with a cargo of general merchandise. The case of the *Harriet* was, that the wind at the time was N.E. and by N., and N.N.E., and her course being E. and by S, she was as near to the wind as she could go, close-hauled, and on the larboard tack; that a good look-out was kept, there being six persons on deck, including the mate; that the *Seringapatam* was first descried about three points on the *Harriet's* lee bow, distant about four cables' length (half a mile), going at the rate of nine knots, steering W.N.W., with a free wind; that, as the *Seringapatam* approached, the *Harriet*, having the wind about half a point free, kept as near to the wind as possible; that the *Seringapatam*, instead of keeping her course, or bearing up, just as she came close to the *Harriet*, luffed up, and struck her on the larboard side, abaft the fore-chains, which caused the barque to fill, the crew saving themselves by jumping on board the *Seringapatam*. On the part of this vessel, it was stated that the wind was N. and $\frac{1}{2}$ W.; that she was on the starboard tack; that the position of the two vessels was such, with reference to the state of the wind, that they were approaching each other so as to cause a risk of collision, in which case, by the Trinity-House Rule, both vessels were bound to port their helms; that the *Seringapatam* did so; and that the collision was owing solely to the *Harriet's* not porting her helm.

The Court was assisted by Trinity Masters.*

ARGUMENT.

Sir J. Dodson, Q.A., for the owners of the foreign ship.—The Trinity House Rule has no application in this case, but where two vessels have the wind large, or a-beam. The *Harriet* pursued the correct course, and had not the *Seringapatam* improperly luffed up, the vessels would have gone clear of each other.

Robinson, Dr., on the same side.

Addams, Dr., for the owners of the *Seringapatam*.—This was a most calamitous accident, and I deeply commiserate

* Captain Ellerby and Captain Gordon.

the loss of the foreign owners ; but in order to obtain indemnification from the British owners, they must make out that the latter's ship was exclusively to blame. This was a case strictly within the Trinity House Rule, and had the *Harriet* ported her helm, as the *Seringapatam* did, instead of starboarding it, there would have been no collision.

Nov. 27.

Seringapatam.

Deane, Dr., on the same side.

DR. LUSHINGTON (addressing the Trinity Masters). — SUMMING UP. Gentlemen, the only point in question between the parties, as a matter of fact, is, from what direction the wind was blowing. On the part of the *Harriet*, it is alleged to have been from the N.E. by N. and N.N.E. ; on the part of the *Seringapatam*, from the N. $\frac{1}{2}$ W. The *Harriet's* course was E. by S., the *Seringapatam's* W.N.W.

Now, let us bear in mind what is really the Rule of the Trinity House. That Rule, I apprehend, is this, that when two vessels approach each other on opposite tacks, especially when one is close-hauled and the other has the wind free, the latter must give way ; and if both have the wind against them, the one on the larboard tack must give way, and the one on the starboard tack keep her course. Now, the *Harriet* being on the larboard tack, if she had the wind free, it was her duty to have given way. On the other hand, though the *Seringapatam* was on the starboard tack, if she had the wind free, it was her duty to have given way.

With respect to the quarter from whence the wind blew, the evidence is perfectly conflicting and contradictory. In a case of this kind, looking at all the probabilities, and not presuming to attach intentional misrepresentation to either party, I should say that the wind was something between the two. There may be some difference in the statements of the parties owing to this controversy as to the quarter whence the wind blew ; the case of the *Harriet* is that she was quite close-hauled ; it may be that she was not quite close-hauled. What was actually done by the respective parties was this ; the *Harriet* starboarded her helm, the *Seringapatam* ported hers, and the collision took place by

Nov. 27. the *Seringapatam* running into the starboard side of the *Harriet* abaft the fore-chains. When the vessels were first descried, the one from the other, according to the statement of the *Harriet*, the *Seringapatam* bore three points to the leeward; according to the statement of the *Seringapatam*, and in her Protest, nearly in a straight line, but, according to another part of her statement, a little to leeward. It is admitted that the *Seringapatam* put her helm to port.

Questions of fact. I am now going to put to you three questions of fact, upon which, I apprehend, the decision in this case must ultimately depend; or rather of nautical law: first, did the *Harriet* do rightly in keeping as close to the wind as possible; in other words, starboarding her helm; and was such a measure useless or nearly so, if she was quite close-hauled? That she had a good look-out there is no reason to doubt, because she states that she saw the *Seringapatam* at the distance of half a mile. Secondly, did the *Seringapatam* do rightly in putting her helm to port? Thirdly, and a very important point in the case, in my judgment, supposing the *Seringapatam* did right in putting her helm to port, did she do so in due time, or, in other words, was there a good look-out kept on board the *Seringapatam*? Because, however right the measure might have been, of porting the helm, if there was previous negligence, which caused the proper measure not to be adopted in due time, and was one of the causes of the accident, then very different consequences, in point of law, will follow. It is stated on behalf of the *Seringapatam*, and sworn to by Mr. Jones,—who could know nothing at all about the matter, as five minutes before he was not on deck, but below,—that there was a proper look-out kept.

There are several circumstances, rather of a minute description, which you must take into consideration, in determining this most important question. I do not find it stated, either in the Protest of the *Seringapatam*, or in their Act on Petition, or in any part of these affidavits, at what time they first saw the *Harriet*, and what interval of time elapsed before the collision took place. I find that the pilot, when he came up, and found an order had been given

to port the helm, cried out, "Jam it hard!" I apprehend this deserves consideration: the pilot, seeing the near approach of the two vessels, repeats the order, and requires it to be carried into effect in the manner most likely to prevent the impending collision.

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Seringapatam.

It will be for you to consider whether, looking at the whole evidence in this case, there was a proper and good look-out kept on board the *Seringapatam*, and, assuming that she did right in porting her helm, whether it ought not to have been done at an antecedent period.

(After retiring to consult.)

Dr. LUSHINGTON.—The gentlemen are of opinion, that *Orinoco*. the *Harriet* did wrong in keeping as close to the wind as possible; in other words, starboarding her helm. With regard to the second question, they are of opinion that the *Seringapatam* acted rightly in porting her helm. I shall not attempt to enter into the reasons why they have come to this conclusion, further than to say that, under the circumstances, they consider that, where there is the least danger of collision, the safest and most proper, and best course to act upon, is for both vessels, when close on a wind, to put their helms to port. On the third question, as to whether the *Seringapatam* ported her helm in due time, and kept a good look-out, they are of opinion that she did not; and I have come to the same conclusion.

These are the conclusions as to the facts; if the Counsel for either party are desirous of saying any thing on the question of law, I am quite ready to hear them.

Sir J. Dodson.—It is quite unnecessary for me to say any thing. If it was for the want of a good look-out that the collision occurred, it was not the fault of the pilot. Argument.

Robinson.—It is clear that the order to put the helm to port originated with the crew, when the pilot was below. If, therefore, there was a negligent look-out, the blame must rest entirely with the crew. Even if the blame rested partly with them and partly with the pilot, the decision of the Court, in the case of the *Diana*,* which was confirmed

* 1 Rob. jun. 131. S. C. 1 Notes of Ca. 357.

Nov. 22. By the Prerogative Court. confirms the liability of the owners of the *Springston*.

STANFORD. **PER CURIAM.**—Under the circumstances of this case, I entertain no difficulty in applying the law to the facts, as found by the Prerogative Masters. The *Harriet* and the *Springston* have both been found to be in blame, and it is impossible to say that any part of the blame attaches to the pilot. It is the duty of the officers and crew to take care that a light-ship is kept, and I am of opinion, with the Prerogative Masters, that that duty was not satisfactorily performed; therefore, according to the decision mentioned by Dr. Robinson, the result must be, that the damage must fall equally upon both parties.

Process.—*Paid*, for the *Harriet*; *Sales*, for the *Springston*.

Prerogative Court of Canterbury.

Add. Court Day.

NOVEMBER 28.

Practice.—In a question respecting the validity of a marriage in a British colony, governed by a law of its own, solemnized between British subjects, according to the rites and ceremonies of the Church of England, by a clerk in Holy Orders of that Church, the officiating minister of the

WARD AND CODD v. DAY.—*Allegation.*—This was a business of proving the will of Mrs. Shirley Elizabeth Day, formerly of Demerara, in British Guiana, late of Lambeth, Surrey, promoted by Henry Ward and Edward Septimus Codd, the executors therein named, against Mr. William Day, the husband of the deceased. His interest being denied, he propounded it in an Allegation, which pleaded that he and the deceased were, on the 10th November, 1837, lawfully married in the parish church of Castries in the Island of St. Lucia, in the West-Indies, according to the rites and ceremonies of the Church of England, by the Rev. Samuel Athill Farr, a priest or minister in Holy Orders of the Church of England, at such time the officiating minister of the said parish church, in pursuance of a

License for that purpose first duly had and obtained ; that an entry of such marriage was duly made in the Register Book of marriages kept in and for the said parish church of Castria. In supply of proof, it exhibited a copy of the entry of the marriage, extracted from the aforesaid Register Book of marriages, and collated with the original. It pleaded the cohabitation of the parties as husband and wife, at Barbadoes and at Demerara until July, 1838, when Mrs. Day left her husband, and it pleaded reputation, &c., concluding with a prayer that administration of the effects of the deceased might be granted to Mr. Day as her lawful husband.

The entry of the marriage was to the following effect : " William Day, of the colony of Demerara, and Shirley Elizabeth Fraser, spinster, of the same colony, were married in this church, by License from his Excellency Thomas Banbury, Esquire, colonel, administering the government, this 10th day of November, in the year of our Lord 1837. By me," &c.

The admission of this Allegation was opposed.

Addams, Dr., in opposition to the Allegation.—When the question at issue is a foreign marriage, the foreign law must be pleaded and proved. *Steadman v. Powell*.^{*} *Montague v. Montague*.[†] If this had been a marriage between parties domiciled in England, it might have been valid, though not so by the *lex loci*. *Ruding v. Smith*.[‡] But here both parties came to St. Lucia from Demerara, as they are said to be of that colony, and the matrimonial law of Demerara, like that of St. Lucia, is different from that of England. § There is another objection. A copy of the entry of the marriage is exhibited ; but this cannot be received as evidence unless it be proved that the Register was kept by some authority. *Coode v. Coode*.||

Waddilove, Dr., on the same side.—In *Herbert v. Herbert*,¶ *Scrimshire v. Scrimshire*,** *Swift v. Kelly*,†† and *Lloyd*

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parish, it is sufficient to plead that a legal marriage was had (a copy of the entry of the marriage in the Register Book being exhibited), without setting forth the *lex loci*, which would appear in the evidence.

Nov. 24.

ARGUMENT.

* 1 Add. 58.

† 2 Add. 375.

‡ 2 Hagg. C. R. 371.

§ Burge, Col. Law, 1 vol. 124.

¶ 1 Curt. 755.

¶ 2 Hagg. C. R. 271.

** 2 Hagg. C. R. 305.

†† 4 Hagg. E. R. 139. 3 Knapp, 257.

Nov. 28. *Ward v. Day.* *v. Petitjean*,* the foreign law was set forth. With respect to marriage registers, where they are not kept by legal authority, they are no evidence of a marriage. *Conway v. Beasley*.† In *Saunders v. Saunders*,‡ in the Consistory Court of London, where the marriage took place in Scotland, and a certificate signed by the Session Clerk was produced, Dr. Lushington held that such certificate was not evidence, and that the fact must be proved by witnesses.

Sir John Dodson, Q.A., in support of the Allegation.—We have done all that is incumbent upon us, by pleading that a legal marriage was had between these parties in St. Lucia, and annexing a copy of the marriage register, and it is for the other side to shew that the marriage is invalid. In *Steadman v. Powell*, which was the case of a marriage in Ireland, it was decided that it was enough to plead that a valid marriage did take place between the parties according to the rites of the Church of Ireland. The other cases cited are cases of marriages in places which have a different marriage law from ours. There is a clear distinction between a foreign marriage and a marriage in a British colony, between British subjects, for there the general marriage law will apply, and *prima facie*, a marriage that would be valid in England, under the Marriage Act, would be valid there between British subjects. The colonies are part and parcel of England; Ireland and Scotland are separate kingdoms. I deny that the same principles of matrimonial law apply to our colonies as to foreign countries. But it is said that St. Lucia is a foreign colony, and that the French law prevails there. Then it is for them to prove this. I contend that this marriage, having taken place in a British colony, according to the rites and ceremonies of the Church of England, and in the parish church, a copy of the entry in the parish register being produced, is *prima facie* a valid marriage. [PER CURIAM.—What authority do you shew for the Register or for the License?] We are not to shew in the first instance an authority. There was no occasion for a License at all. [PER CURIAM.—If the marriage

* 2 Curt. 251.

† 3 Hagg. E. R. 651.

‡ Libel admitted 19th Feb. 1846.

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law of the realm, before Lord Hardwicke's Act,* extended to the colonies, what authority is there for taking the governor's License to be proof of the validity of the marriage? We do not say that the governor's License is proof of the validity of the marriage. The Court may take it as at least *prima facie* evidence. [PER CURIAM.—What law prevails at St. Lucia?] Not a law which prevents British subjects from carrying the English law of marriage with them there. In *Duncan v. Duncan*,† in the Consistory Court of London (which was the case of a marriage in Java), where the proof of a foreign marriage was objected to as insufficient, Dr. Lushington said: "If it was absolutely necessary, in all cases of this description, where the marriage was in a foreign country, that I must have actual and direct proof that it was according to the *lex loci*, and valid by that law, it would amount pretty nearly to a denial of justice. I do not apprehend that such strictness of proof is required." As to the authority for the parish register, where public documents are kept, if you prove a copy, that is sufficient. Copies of entries of marriages in India are sent to the East-India House, and copies of those are allowed to be produced.

JENNER, Dr., on the same side.—This is very like the marriage at Madras in *Lautour v. Teesdale*,‡ where it was held that the parties carried the English law with them. It has been assumed that the parties in this case were domiciled at Demerara, but this is an unauthorised assumption.

PER CURIAM.—This is a very wide and a very important question as to marriages in our colonies, leading to important consequences whichever way decided. I must take time to consider the case. *Cur. adv. vult.*

SIR H. JENNER FUST.—I have looked into the cases, and I think it is for the interest of both parties that the Court should not go into an inquiry respecting the law of St. Lucia in this stage of such a question. Here is a marriage alleged to have been solemnized between two British subjects, in a British possession, according to the rites and

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* 26 Geo. 2, c. 33.

† 2 M. Law Mag. 612.

‡ 8 Taunt. 830. S. C. 2 Marsh. 243, *nom. Latour v. Teesdale.*

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 Ward v. Day. Church, he being the officiating minister of the parish
 church in which the marriage was solemnized. *Primâ facie*,
 it would be a valid marriage, and I can know nothing of
 the law of St. Lucia except from the examination of wit-
 nesses; for although Mr. Burge says that it is the French
 law, I cannot take it except from the deposition of wit-
 nesses. Most of the cases are suits of nullity of marriage, in
 which, as in the case of *Ruding v. Smith*,* the party
 pleaded the circumstances of the marriage, and that it was
 illegal according to the law of the place where it was cele-
 brated. The case of *Dalrymple v. Dalrymple*† was a case
 of a Scotch marriage, not of a marriage according to the
 Church of England, by a minister of that Church officiating
 in the parish church, but a case of an irregular marriage,
 and not a *primâ facie* valid marriage, which would entitle
 the wife to found a suit for restitution of conjugal rights.
 In *Montague v. Montague*,‡ the marriage was in Scotland;
 and in *Steadman v. Powell*,§ the marriage was pleaded to
 have taken place at Dublin, according to the rites and cere-
 monies of the Church of Ireland, and therefore it was
primâ facie a valid marriage. I am of opinion that, in this
 case, *primâ facie*, a good and valid marriage is pleaded;
 and it is for the other party to shew that such a marriage,—
 a marriage between British subjects, in a British possession,
 according to the rites and ceremonies of the Church of Eng-
 land, by a minister of that Church, officiating as such in the
 parish church,—is not a good and valid marriage; and I
 could not, on a mere suggestion that it was not according to
 the law of St. Lucia, take upon me to reject this Allega-
 tion. Therefore, I admit it to proof, and it is for the other
 party to shew that this is not a valid marriage in St. Lucia,
 and being so, is an invalid marriage here.

Allegation
 admitted.

Proctors:—*Waddilore*, for the executors; *Wadeson*, for the husband.

* 2 Hagg. C. R. 371.
 ‡ 2 Add. 375

† *Ibid.* 54.
 § 1 Add. 58.

High Court of Admiralty.

DECEMBER 1.

4th Sess.

THE "GREAT NORTHERN."—*Act on Petition—Protest.* Wages. —
 This was an action by the late master of the ship to recover Where a mas-
 the amount of his wages (£47), under the Act 7 & 8 Vict. ter of a ship
 c. 112, which gives a master a remedy *in rem* in case of the sued *in rem* for
 bankruptcy or insolvency of the owner. Upon the arrest wages under the
 of the vessel, an appearance was given by the mortgagee 7 & 8 Vict. c. 112,
 under protest, on the ground that the owners were not bank- on the ground
 rupts or insolvents at the time of the arrest, for, although of the bank-
 they had filed a declaration of insolvency, which had been ruptcy or insol-
 published in the *Dublin Gazette*, they had not been declared vency of the
 bankrupts or insolvents. owner, who had
 filed a declara-
 tion of insol-
 vency in Ire-
 land, which had
 been published
 in the *Dublin*
Gazette, but
 no commission
 had issued, as
 required by the
 Act 6 Will. 4,
 c. 14:—Held,
 that there was
 no legal bank-
 ruptcy; that
 the arrest of
 the ship was
 not good, and
 the protest was
 pronounced for.

Addams, Dr., for the mortgagee.—The question is, whe-
 ther the owners were bankrupts or insolvents within the
 true meaning of the Statute, 7 & 8 Vict. c. 112. In *The*
*"Princess Royal,"** the Court decided that, to entitle the
 master to this remedy, the owner must have become an
 "insolvent debtor," in the legal sense of the term. These
 persons have not taken the benefit of the Insolvent Debtors'
 Act; they have only filed a declaration of insolvency. By
 the Act 6 Will. 4, c. 14, a declaration of insolvency is de-
 clared to be "an act of bankruptcy" in Ireland; but the
 commission must be sued out within two months after the
 declaration has been advertised in the *Dublin Gazette*, which
 in this case was not done. There is another ground of ob-
 jection. The wages were earned previous to September,
 1843, and the Act 7 & 8 Vict. c. 112 received the Royal
 Assent 5th September, 1844, and it cannot have a retro-
 spective effect. In *The "Repulse,"*† the wages were in the
 course of being earned, and the contract was not completed
 until after the Act came into operation.

Bayford, Dr., for the master.—The Act 7 & 8 Vict. c. 112
 does not require that the owner shall have taken the benefit

Nov. 21.
 ARGUMENT.

* 4 Notes of Ca. 70.

† *Ibid.* 166.

1a. of the Admiralty Statutes. And it is sufficient that he be
 insolvent or bankrupt. In *The "Sphinx"* the Court
 said that it is entertained some questions of general in-
 solvency. It might be that the master is being deprived of that
 remedy and benefit which the Legislature intended to con-
 fer upon him. In respect to the other point, the Court
 said, in *The "Republic,"* that the Statute was retrospective.

2a. 1
 6-10-1880.

THE LONDON.—In this case the vessel was arrested
 at the suit of the master, under the provisions of the 7 & 8
 Vict. c. 112, sec. 16, which enacts:—that all the rights, hon-
 ours, and remedies (save such remedies as are against
 a master himself), which, by this Act, or by any law,
 statute, custom, or usage, belong to any seaman or mariner,
 not being a master mariner, in respect to the recovery of his
 wages, shall, in the case of the bankruptcy or insolvency of
 the owner of the ship, also belong and be extended to mas-
 ters of ships, or master-mariners, in respect to the recovery
 of wages due to them from the owner." The vessel has been
 arrested, and an appearance is now given, under protest, by
 the mortgagee of the *Great Northern*, alleging that, at the
 time the arrest took place, the owners were neither bankrupt
 nor insolvent.

I confess, I should have thought that this might have been
 brought before the Court in a more simple statement, and
 one more easily to be comprehended, than it appeared to me
 to be on the first perusal of these papers, because it is really
 a simple question, whether the owners were bankrupt at the
 time. But it has been mixed up with an averment of insol-
 vency,—two totally different and distinct points. An owner
 of a ship may be within this Statute, provided he be either
 a bankrupt or an insolvent; but they are two different
 things. If it be intended to claim the right given by the
 Statute, to which I have referred, it must be proved that the
 character of a legal bankrupt or a legal insolvent properly
 attaches to the owner or owners, for I have already decided
 —a decision from which it is not my intention to depart—
 that the true meaning and proper construction of the Sta-
 tute is, that the owners must not be insolvent in the general

sense of the term,—that is, incapable of making payment ; but they must be bankrupt in the legal sense of the term, or insolvent in the same sense. Now let us see how this matter stands in point of fact. Dxc. 1.
GreatNorthern.

It is alleged that a declaration of insolvency was made about the 12th of May preceding the arrest ; at any rate, about five or six weeks before it took place, which was in the month of June following. That declaration of insolvency is, or is not, an act constituting a man a bankrupt. If it be an act, *per se*, constituting the individual a bankrupt, then, under the Statute of Bankruptcy applicable to Ireland, that person, at the time of the issuing or the execution of the warrant, was a bankrupt, the ship has been properly arrested, and the master would be entitled to his wages ; but if this was only an incipient step, not rendering him, in the proper, legal sense, a bankrupt at that time, but requiring something more to be done at a subsequent period, which, if done, might have a relation back to the original act done ; then, if that which was requisite to be done, at a subsequent period, has not been and cannot now be done, in my opinion, this man would not be a bankrupt, according to the true intention and meaning of the bankruptcy law of Ireland. In 6 Will. 4, c. 14, sec. 21, acts of bankruptcy are mentioned ; but in the 22nd section it is said, “ That if any such trader shall file, in the office of the Lord Chancellor’s Secretary of Bankrupts, a declaration in writing, signed by such trader, and attested by an attorney or solicitor, that he is insolvent,”—here the word “ insolvent ” is used, not in a technical sense, but a general sense,—“ or unable to meet his engagements, the said Secretary of Bankrupts shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the *Dublin Gazette* to insert an advertisement of such declaration therein ; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader at the time when such declaration was filed.” Here the effect of it is defined by the section itself ; it is an act of bankruptcy ; but I apprehend there is a very great difference between a man being a bank-

DAC. 1. rupt, and committing an act of bankruptcy. The section proceeds: "But no commission shall issue thereupon unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the *Dublin Gazette* within eight days after such declaration was filed; and no docket shall be struck upon such an act of bankruptcy before the expiration of four days next after the insertion of such advertisement." Now, according to the statement before me here—a statement uncontradicted—it appears that nothing has been done to constitute this man a legal bankrupt, except the declaration of insolvency mentioned in the 22nd section. It appears that no commission has been sued out within the two months, and consequently none can be sued out now.

Great Northern.

Party not a bankrupt. It is impossible for me to designate him as a bankrupt, because the section declares that no commission of bankruptcy shall issue unless it be done in two months, which two months are expired. This appears to me the plain state of the case; and as I consider myself strictly bound by the Act of Parliament from allowing the vessel to be arrested, unless he be a bankrupt, and there is here no bankruptcy; it is, therefore, not a good arrest, and I pronounce for the protest.

Protest pronounced for.

Addams.—The Court will give the costs?

PER CURIAM.—At the time of the arrest the commission was pending, and if it had been taken out the arrest would have been legal in one sense of the term, and the man would have been a bankrupt at the time.

Bayford.—I trust the Court will allow another warrant to issue against the other owner.

PER CURIAM.—If you proceed on a fresh warrant, you must apply to the Registrar to exercise his judgment. If he refuses it, you must give notice of motion; but I cannot dispose of the question now.

Proctors.—*Bathurst*, for the mortgagee; *Orme*, for the master.

Prerogative Court of Canterbury.

DECEMBER 3.

4th Sess.

IN THE GOODS OF JANE RANDOLPH GUNNING, SPINSTER, DEC.—*Motion, ex-parte*.—The deceased died 19th May, 1846. On the 25th September, 1845, being confined to her bed by sickness, she produced a paper, all in her own handwriting, to the Rev. W. L., her brother-in-law, and to Mrs. S. A. L., his wife, telling them that it was her will, and requested them to witness it, and they immediately signed their names thereto as witnesses. The paper begins: "This is the last will and testament of me, Jane Randolph Gunning," &c.; and it concludes: "In witness hereof I have hereunto set my hand and seal Jane Randolph Gunning this 25th day of September 1845." A seal was in the margin. Then followed, as if a new, consecutive paragraph of the will (not, as usual, in the margin), the following attestation-clause: "Signed, sealed, published, and declared by the testatrix, Jane Randolph Gunning, as and for her last will and testament, in the presence of us, who in her presence, at the same time, and at her request, by her direction, and in the presence of each other, have hereunto subscribed our names as witnesses. S. A. L., W. L." The attesting witnesses, in their affidavit, state that, although the deceased did not sign her name, and did not in terms acknowledge the names, "Jane Randolph Gunning," embodied in the last paragraph of the will, to be her signature, before them, yet they have no doubt she so intended, and that the same were written by her previously to her requesting them to attest the paper. The personal property was under £1,000.

Where a testatrix wrote her name in the *testimonium*-clause, or last paragraph of the will, not formally signing it at the foot or end, in the usual way:—Held, that it was a due execution according to the Statute.

Harding, Dr., moved for probate to the sole executor. MOTION.

SIR H. JENNER FUST.—This paper is all in the deceased's handwriting; it commences, "This is the last will and testament of me, Jane Randolph Gunning;" and it concludes, "In witness hereof I have hereunto set my hand."

Dec. 3. What can she mean but that the name, "Jane Randolph Gunning," which follows, is her "hand." Then comes the attestation-clause. It is a very different case from that of *Woodington*,* and the cases† which have followed it, where the name was only in the attestation-clause. Under the circumstances, I am of opinion that the will is duly executed according to the Statute.

Wheler, Proctor.

AN EXECUTOR, after taking probate of the will, pays to a minor the amount of her legacy under it, and receives her discharge; such legatee subsequently citing him to bring in the probate and prove the will, the executor prays the Court to order the money so paid to be brought into the Registry: — Held, that the acknowledgment of a minor not being a valid discharge, the Court could not consider the payment as that of a legacy, and consequently could not compel the party to bring the money so paid into Court.

GODDARD v. NORTON.—*Act on Petition*.—The testator in this cause died in December, 1842. In January, 1843, probate of his will was granted to W. T. N., sole executor named therein, and in February following he paid to R. H., now R. G. (wife of J. G.), £97, being the amount of a legacy bequeathed to her by the will, less £3 legacy-duty, and the usual discharge was signed by her. After her marriage, R. G. took out a decree against W. T. N., citing him to bring in the probate, and prove the will in solemn form. W. T. N. appeared, and prayed that the proceedings might be stayed until R. G. brought in the £97 paid to her as her legacy under the will. An Act on Petition being entered into, R. G. alleged as a ground for the Court's refusal of the prayer, that she was born on the 15th November, 1822, and that if W. T. N. did pay any sum as a legacy to her, and if she acknowledged the receipt thereof, the payment was invalid, and the discharge not binding in law, she being a minor.

Addams, Dr., for the executor.—Mr. N. was not aware, at the time he paid this legacy, that R. G. was a minor; she importuned him for the payment of it, and did not suggest at the time any doubt as to the validity of the will. The fact of her having been under age at the time, which was concealed, is no reason why she should not bring the money into the Registry. She has received it, and before she can call upon the executor to prove the will, she is bound,

* 2 Curt. 324.

† *Re Chaplyn*, 4 Notes of Ca. 469. *Re Davis*, *ibid.* 522. *Re Atkins*, *ibid.* 564.

according to the usual practice of the Court, to bring this money into the Registry, and it would go *pro tanto* towards the costs of the suit, if she should be condemned in them.

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JENNER, Dr., for R. G.—This was a hasty and suspicious payment made by the executor, who is a solicitor, before he had time to inquire into the assets, and it was paid in the presence of the party who is almost the universal legatee. It is not to be expected that a person, when paid a legacy, is to say, "Oh, I am going to dispute the will." A. G., at the time when they say she was paid, could not have disputed the will, not being then of age.

SIR H. JENNER FUST.—The only difficulty I have is, JUDGMENT. whether I can view this as the payment of a legacy, so as to compel the party to bring the money into Court. She, having been a minor at the time, could not receive it as a legacy, and her receipt would be no valid discharge; it would be held by the Court of Chancery that it was a payment by the executor in his own wrong. [Addams.—She does not deny that she received the money, *bond fide*, as her legacy, and that it is in the hands of her husband.] Still it is not legally paid and received as a legacy. I have looked into the cases, and I cannot find any authority that would justify me in granting the prayer: in one case,* Lord Hardwicke was afraid to hold that payment to a minor discharged the executor. No doubt, if the party had been of age, I should have compelled her to bring the money in; but my difficulty is, whether it is such a payment as I can consider as that of a legacy. If I sat as a Court of Equity, I would do it. [Jenner.—A party cannot make a contract under age.] You have not a shadow of merit; but, unfortunately, I am afraid I cannot consider this payment to a minor as payment of a legacy. It is clear that the party did receive this money of the executor as her legacy under the will, for she has signed the Stamp-Office receipt, and if she had been of age at the time, she would have been compelled to bring it in. She was, however, not of age, and consequently not

* *Philips v. Paget*, 2 Atk. 80.

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able to give a legal discharge, and I am of opinion that, in point of law, I have no power to order the party to bring in the money; I cannot take her receipt as a legal discharge of the payment of a legacy (though I have no doubt the money was received), and my jurisdiction does not go so far as to authorize me to compel a party to refund money paid improperly. But I must intimate to the party, that if she does proceed to dispute the will, she will do so at the peril of costs. [*Addams*.—Will the Court direct her to give security for costs?] No, I reserve the question of costs. [*Addams*.—The party is a pauper.] Then it would be a denial of justice. I must reject the petition, and I reserve the question of costs.

Petition re-
 jected.

Proctors:—*Abbot*, for Goddard; *Pownall*, for Norton.

Practice. —
 A sole legatee
 named in a will
 having cited
 the next of kin
 of the deceased
 to accept or re-
 fuse adminis-
 tration with the
 will annexed,
 or to shew
 cause why the
 same should
 not be granted
 to him; two
 of them, who
 did not appear
 to the Decree,
 having released
 their interest,
 were produced
 as witnesses by
 the party op-
 posing the will:
 — Held that
 parties, so cited
 and not appear-
 ing, were par-
 ties in the
 cause, and
 could not be
 examined as
 witnesses until
 dismissed.

SANDERS v. WIGSTON AND OTHERS.—*Act on Petition.*—
 The testatrix, Jessie Wigston, spinster, late of the Château de Ramet, near Liege, in Belgium, died 15th September, 1844, leaving Messrs. Francis and James Wigston, Mary and Charlotte Wigston, spinsters, and Mrs. Caroline Clark (wife of Mr. Francis Clark), her brothers and sisters and only next of kin, and together with Mr. Richard James Wigston and Mary Amelia Wigston, spinster, her nephew and niece, the only persons entitled to her personal estate if she had died intestate. Her estate, all personalty, consisted of £3,471 Three per Cent. Consols, £58 at her banker's, and her wearing apparel, trinkets, &c. She left behind her a will, of which the following is a copy: "Chateau de Ramet, Sept. 1st, 1844. I hereby leave to Chas. Oakley Sanders, in case of my death, all that I possess in the funds, &c. &c. &c. Jessie Wigston. Witnessed by Marie Antoinette Lange. J. J. Broquet." Mr. C. O. Sanders, therein named, extracted a Decree, calling upon the next of kin and parties entitled in distribution to accept or refuse Letters of Administration with the will annexed, or to shew cause why the same should not be granted to him, as the sole legatee named in the will. The Decree was personally

served on Mr. James Wigston, the brother, and Mrs. Clark and Miss Mary Wigston, the sisters, of the deceased, and as to the other parties, who were absent from England, on the Royal Exchange, and their known agents in this country. An appearance was given to this Decree on behalf of Mrs. Clark alone, and the will was propounded by Mr. Sanders against the parties not appearing *in pœnam*; and witnesses were examined upon his Allegation. An Allegation on behalf of Mrs. Clark was admitted, and her Proctor was assigned to prove on the First Session of Easter Term, April 18. 1846; but the Term Probatory was extended till the Third Session. Amongst the witnesses examined upon this Allegation were Mary Wigston and Charlotte Wigston, sisters of the deceased; James Wigston, the brother, and Mary Amelia Wigston, the niece (four of the parties cited who did not appear), the first two being produced before, and the last two after, the extension of the Term Probatory. Mary and Charlotte Wigston, the sisters of the deceased, previous to their being produced as witnesses, had released all their interest in the personal estate and effects of the deceased.

The evidence of these two witnesses being objected to, their depositions were sealed up, and an Act on Petition was entered into by the Proctors. On behalf of Mrs. Clark it was alleged that these two parties, in consequence of their releases, had no interest whatsoever in the suit, it being the rule of the Court to grant Administration only to persons having an interest in the effects of the party deceased; that the evidence of Charlotte and Mary Wigston, and also of Captain Wigston (three of the parties cited), is absolutely necessary for the purposes of justice in this cause; and that the Act 6 & 7 Vict. c. 85, enacts that no person offered as a witness shall be excluded by reason of interest from giving evidence, with the proviso that the Act shall not render competent any party to any suit, action, or proceeding, individually named in the record. The adverse Proctor merely dissented, and submitted the question at issue to the judgment of the Court.

Bayford, Dr., for the party cited.—Lord Denman's Act* Nov. 14.

* 6 & 7 Vict. c. 85.

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Wigston.*

ARGUMENT.

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Wigton.

does not apply to this case ; it does not refer to these Courts. With respect to the practice of this Court prior to that Act, there is no case in which the point was raised, so that we are driven to look at the question on principle. In cases of contempt, Oughton* says : "*Absens autem non est contumax ad aliam finem quàm ad quem se sistere movebatur.*" And in *Harrison v. Harrison*,† this Court said, "There is no decision in these Courts to the extent that a party in contempt in the Court below cannot prosecute an appeal to a superior Court." The Act,‡ which substitutes imprisonment for excommunication, leaves the party in the same situation in other respects as before. The Decree calls upon these parties to appear, and if they do not appear, they are bound by the proceedings in their absence. It would have been open to them to appear to the Decree, and declare they proceeded no further, and the Court could have dismissed them, so that they might have been examined, the Decree being still binding upon them. In *Arnold v. Earl*,§ a party cited, as next of kin, who did not appear to the Decree, being wanted as a witness, appeared and declared he did not oppose the will, and prayed to be dismissed, and the Court dismissed him, and he was examined. The persons examined in this case have released their interest in the fullest terms ; and it is a rule of this Court not to decree Administration to parties without an interest. We could not have forced these parties to give an appearance. An objection of so fine and technical a kind as this ought not to prevail.

R. Phillimore, Dr., on the same side.—If a party proceeding can exclude persons from appearing as witnesses, he may get rid of most material evidence. *Casey v. Beachfield*.||

Addams, Dr., for the party propounding the will.—The Act on Petition, which relies upon the Statute, is abandoned in the Argument. This question came incidentally before the Court in *Meryweather v. Turner*.¶ These parties are not

* Tit. 37, n. 7.

† 1 Notes of Ca. 303. 3 Curt. 1.

‡ 53 Geo. 3, c. 127.

§ 2 Lee, 380.

|| Prec. Cha. 411. S. C. Gilb. Ca. Eq. 98.

¶ 3 Notes of Ca. 55. 3 Curt. 802 (N. S. P.)

competent, being excepted by the Act of Parliament, as parties named in the record. If the Act has nothing to do with the case, they are incompetent by the practice of these Courts, as parties in the cause. If they had applied to be dismissed, it would have been another thing.

Twiss, Dr., on the same side, cited *Sinclair v. Sinclair** and *Lovegrove v. Licet*.†

Bayford, in reply.—The note in *Lovegrove v. Licet* is, "A person made and remaining principal party cannot be a witness;" which is in our favour. *Sinclair v. Sinclair* was a question of law as to a party on the record.

PEN COXIAN.—This is a very important point of practice, arising, perhaps, for the first time, namely, whether a party cited to accept or refuse administration with will annexed, or to shew cause why it should not be granted to a sole legatee, can be examined as a witness, after releasing all interest in the cause. I must consider the case. Cur. adv. vult.

SIR H. JENNER FUST.—The petition in this case respects the competency of two witnesses produced in a cause of "*Sanders v. Wigston and others*," and the circumstances under which the question arises are these:—The deceased in the cause, *Jessie Wigston*, died a spinster, having (as

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* 13 Mee. & W. 640.

† *Lovegrove v. Licet*; Prerog. Feb. 1765. *Licet* propounded a former will, in opposition to a will of a later date by *Lovegrove*. *Licet* made *Lovegrove* a party, and called on him for his Answer, and also prayed that his evidence might be required as a witness, not having objected to his Answer. The Court rejected the prayer, for that a person made and remaining principal party cannot be a witness. A principal party, who was so voluntarily by entering a *Caveat* and dismissed on application to the Court, may be examined after dismissal (*viz.* after he ceases to be a party). Counsel cited the case of *Bowman* [*Beaumont*] *v. Sharpe*, Del. Party was first dismissed before being examined. It was said that in Chancery a party may be an evidence, for the Personal Answer is evidence. (Obs. No further than that makes against the Respondent himself.) Co-defendants may be examined as witnesses, for otherwise persons might be made parties in order that their evidence might not be introduced.—*MS Notes of Sir James Marriott*, penes *Dr. Twiss*. *Lovegrove v.*
Licet.

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—
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alleged) made a will, and the paper now produced as her will, purporting to be dated the 1st September, 1844, she dying on the 15th, bequeaths what must be taken to be nearly all the property of the deceased to Charles Oakley Sanders. No executor is appointed, and no residuary legatee is appointed, and the legatee, Mr. C. O. Sanders,—described as “sole legatee named in the will,”—would be entitled to a grant of administration with this paper annexed. The next of kin were cited by a Decree which was extracted on the 21st May, 1845, and was personally served on three of the parties, one of the brothers and two of the sisters of the deceased, and on the Royal Exchange as to the other parties, who were abroad. The effect of the Decree is to call upon the parties to accept or refuse Letters of Administration with the will annexed, or to shew cause why the same should not be granted to Mr. C. O. Sanders, as sole legatee named in the will. The Decree was returned to this Court, and an appearance was given for one of the parties, Mrs. Clark, the sister; none of the other parties appeared, and the cause went on against them *in pænam*, an intimation being contained in the Decree, that if the parties did not appear to accept or refuse administration, or shew cause why administration should not be granted to Mr. Sanders, the Court would proceed to decree administration accordingly. However, Mrs. Clark does appear, and she opposes the will, and the will is propounded in a special Allegation by Mr. C. O. Sanders, and witnesses are examined upon this Allegation; and on the part of Mrs. Clark, an Allegation is given in opposition to the will, which pleads that it was obtained from a person of weak mind by undue influence, and is the effect of fraud. On this Allegation several witnesses have been examined, and amongst others, two ladies of the name of Wigton, sisters of the deceased, and two of the parties cited, have been produced as witnesses in the cause, and it was objected, at the time they were produced, that they were parties in the cause, and that, consequently, they could not be examined as witnesses in opposition to the will, notwithstanding they had executed a release at the time. In order to prevent a

failure of justice by the death of the witnesses, the examination of these persons was taken *de bene esse*, and their depositions were sealed up, for the direction of the Court, and all the parties are ignorant of what they have deposed.

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The questions for the Court are, first, whether parties so called upon to accept or refuse administration with the will annexed, or to shew cause, and not having appeared, are to be considered as parties in the cause; and secondly, if they are, whether they can be examined as witnesses until they have been dismissed from the cause,—that is, whether parties in the cause can be examined as witnesses.

When the case was argued, it was not supposed that any case had occurred of late years in this Court with reference to the examination of parties in the cause, but the cases referred generally to the practice of the Court as to the renunciation of executors and parties claiming legacies, before they were examined as witnesses; but one case was mentioned by Dr. Twiss, which occurred in 1765, in which it had been held that a person made a party could not be examined as a witness in the cause, not being dismissed.

An Act on Petition has been entered into, which sets forth the circumstances and the grounds upon which it is contended that the evidence of these witnesses is admissible; the other Proctor “dissenting and submitting the question at issue to the judgment of the Court,”—that is, I presume, whether the witnesses are competent. This is rather a short mode of bringing the subject before the Court, as it furnishes the Court with no guide to the case of the other party. It is usual in an Act on Petition to bring the case of each party before the Court; whereas, it does not appear whether it is contended and denied that, under the Act, the evidence of these witnesses is admissible, or, with regard to the ordinary practice of the Court, that parties in the cause can be examined, or that persons cited to accept or refuse administration, and not appearing, are not parties in the cause.

In this state of the case, it may be difficult to understand whether the Act of Parliament was intended to apply to proceedings in these Courts. The words are general; the

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Does not de-
 cide the case.

parties may have an interest in the issue at the time of their examination as witnesses, provided they are not parties named in the record. Strictly speaking, this Court is not a Court of Record, nor, in any proceedings, is called by that name. But I apprehend the meaning of the Act to be, "who are not named parties in the suit;" as the Act says, with respect to Courts of Equity, that any defendant to any cause may be examined as a witness on behalf of the plaintiff or any co-defendant. If the previous words in the Act applied to the Court of Chancery, which has no record, there would have been no necessity to introduce this clause. I am inclined to hold that the Act does apply to these Courts, and that if a witness is offered who has an interest in the cause he may be examined. But I do not decide this question, as it is not necessary in this case; but my impression is, that a person having an interest in the cause, who is offered as a witness, could not be refused. But there is a proviso, that no party on the record, that is, no party in the suit, shall be admitted as a witness. So I put the Act of Parliament out of my consideration, as the former part is qualified by the latter, that it is not to apply to a party named in the record. So that the question is left, as it appears to me, to be decided according to the practice of the Court, under the circumstances. The Act does not say that a person who was a party on the record should not be examined, but that the Act should not render him competent as a witness: so that the matter is left as it was before the Act passed. I am, therefore, of opinion that it must be dealt with according to the rules and practice of the Court, unaffected by the Act of Parliament. It is clear that, in this Court, the usual practice is for the party intended to be examined as a witness to be dismissed, and if such an application is made by an executor, unless liable to costs, he is dismissed; and if he is a legatee, having released his legacy, he is entitled to be examined as a witness; and this is according to the practice of the Court. In *Mundy v. Slaughter*,* there were three executors of a will, and one

* 2 Curt. 72.

of them renounced the probate and execution of the will, and released his interest under the will, and he was examined as a witness in the cause.

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The first question is, are these ladies parties in the cause or not? The cause is described as that of "*Sanders v. Wigston and others*;" that is, against Mr. Francis Wigston and others of that family, and although an appearance was given by only one of the family, and the cause goes on against the rest *in penam*, they are bound by the Decree of the Court, not having appeared to accept or refuse administration, or to shew cause why administration should not be granted to Mr. Sanders. Therefore, clearly, on the face of the proceedings, they are parties in the cause, though they have not done any act, and no step has been taken by them, with reference to the Decree against them; under the general principles and practice of this Court, they are parties in the cause, and I think this is shewn by the case of *Gascoyne v. Priddle*.* In that case, the doctrine was recognised, that a party cited and not appearing was still a party in the cause. Martha Priddle died, having made a will in the presence of her mother and sister, appointing E. G. executor and residuary legatee. A. P., the deceased's sister, by her guardian, opposed the will, which was propounded by E. G., who called in the mother and all the next of kin to see it proved, by Citation with intimation; none appeared, but the guardian for A. P. The executor gave in an Allegation, pleading the handwriting of the deceased's mother and sister as witnesses to the will. It was objected that the mother and sister were living, and therefore their handwriting could not be pleaded; they must be examined or their Answers taken. Sir George Lee was of opinion that it was proper to plead their handwriting, for, first, without so doing, E. G. could not have their Answers to that fact; "secondly, the mother did not appear, and therefore he could not have her Answers; but yet, as she was made a party, and they proceeded against her *in penam*, they could not examine her as a witness." And he over-

The parties are parties in the cause.

Gascoyne v. Priddle.

* 2 Lee, 48.

DEC. 3. ruled the objection. In the present case, the parties, being
Sanders v. cited, will not appear, and the proceedings go on against
Wigston. them *in pœnam*. Is this not precisely the same case? So
 that the doctrine is there recognised, that parties cited and
 not appearing are still parties in the cause, and, according to
 the rules and practice of the Court, could not be examined
 as witnesses so long as they continued parties in the cause.

Lovegrove v. In the case mentioned by Dr. Twiss, from the Notes of
Licet. Sir James Marriott,—*Lovegrove v. Licet*, 1765,—it was held
 that “a person made and remaining principal party cannot
 be a witness;” implying that he may be examined
 after dismissal, and there are cases where parties have
 been dismissed before examination. So that a party
 may be examined as a witness after dismissal, and that I
 believe to be the general doctrine of these Courts. This is
 the result of another case in Sir George Lee’s Reports, that

Arnold v. Earl. of *Arnold v. Earl*,* in which B. N., a next of kin who had
 not appeared to the Decree, appeared, and by special
 proxy prayed to be dismissed, that he might be examined as
 a witness in the cause, and the question was whether he
 ought to be dismissed. It appears to be admitted by the
 argument that, so long as he had not appeared and was not
 dismissed, he continued a party in the cause. The Counsel
 on one side referred to *Beaumont v. Sharpe*,† and on the
 other side to *Gilley v. Gilley*,‡ *Yardley v. South*,§ and other
 cases. But all these cases turned on this, whether the parties
 ought to be dismissed. Sir George Lee says: “Under
 the circumstances of the case, I was clearly of opinion that
 B. N. ought to be dismissed; he had not voluntarily made
 himself a party, but was called in, and had not intermeddled
 at all; he had now appeared, and declared he would
 not oppose the will, and therefore had fully answered the
 purpose for which he was cited. In the cases where this
 Court had refused to dismiss parties, they had materially
 acted in the cause, and injustice would be done the adversary
 by dismissing them; but in this case great injustice
 would be done to Earl by detaining B. N.” So that the

* 2 Lee, 380.

† Del. 14th Feb. 1752 (see post, p. 87).

‡ Del. 1738.

§ Prerog. 1744.

question was, whether any act had been done which amounted to intermeddling, and whether the party was entitled to be dismissed: affirming, therefore, the general rule, that a party in the cause, although he do not act, is still to be considered as a party in the cause, and cannot be examined as a witness until dismissed.

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In that case, as I said, reference was made by Counsel to the case of *Beaumont v. Sharpe*, and I have a note of that case by Sir Edward Simpson, in his *Repertorium*, which was this: Jordan died, leaving a draft of a will, for which he gave instructions a very short time before his death, disposing of real and personal estate, which was not executed, appointing Elizabeth Beaumont and her son executors. She, supposing the will not to be good for want of execution, prayed administration in the Prerogative Court, as sister and next of kin to the deceased, as being dead intestate, and was sworn administratrix. Philippa Sharpe, another sister, entered a *Caveat*, opposed the grant of administration to Elizabeth Beaumont, and prayed it to be granted to herself. Inventories, affidavits as to scripts, &c. were decreed and given in. Mrs. Beaumont brought in the will, and William Beaumont, the other executor, intervened for his interest and propounded the will. Mrs. Sharpe opposed it, and Mrs. Beaumont then declared that she would neither propound nor oppose the will, and by special proxy renounced probate and administration (in case of the deceased being pronounced to have died intestate), and prayed to be dismissed from the cause, she being a necessary witness to prove declarations of the deceased in support of the will. This was opposed on behalf of Mrs. Sharpe, and the Court (Dr. Bettesworth) was of opinion that she ought not to be dismissed, and decreed that she should continue a party. Mrs. Beaumont and her son appealed from this decision to the Court of Delegates. Two Common Law Judges (Mr. Justice Denison and Mr. Justice Birch) and Dr. Collier were clearly of opinion that she ought to be dismissed, and said it was the constant practice in the Court of Chancery to dismiss a party in order to be a witness. Dr. Smalbroke and Dr. Ducarel were of opinion that the practice of the Ecclesiasti-

*Beaumont v.
Sharpe.*

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cal Court was contrary, especially in such a case as this, where Mrs. Beaumont had done so many acts as a party, and where William Beaumont had come in only as an intervener. If she was dismissed, his intervention must drop for want of parties to support the original suit, and the nature of the suit would be changed from a business of granting administration on intestacy, to a business of propounding and proving a will by witnesses, without an original Citation to found the suit; and, besides, Mrs. Beaumont, as next of kin, might herself afterwards contest over again the validity of the will, if she was not continued a party in this suit. There being, however, three judges against two, Dr. Betterworth's decree was reversed, and Mrs. Beaumont's proxy of renunciation was admitted; she was dismissed from being a party to the suit, in order to be examined as a witness. This again shews that it is necessary that a party should be dismissed before he can be examined as a witness, and that, before his dismissal, he could not be examined. All the cases seem to go in affirmance of the general doctrine, that a party, as a party, could not be examined as a witness in the cause.

There are several other cases, pretty much to the same effect. In one case, *Pardoe v. Thompson, calling herself Pardoe*, and *Thompson v. Thompson*,* in 1737, a person

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Thompson.

* Thomas Pardoe made his will, and appointed his wife Sarah and son Thomas executors. Mary Thompson, otherwise Pardoe, claiming to be his wife, entered a *Caveat*, to which she was warned by Sarah Pardoe. Mary had no appearance given for her, and would not have been a party, but the other side described her as a party. The Court was of opinion that she had made herself a party by entering a *Caveat*. Thomas Pardoe, son of Mary, alleged that he was the lawful son and executor. Thomas, son of Sarah, alleged that he was lawful son and executor. The interest of Thomas, son of Mary, was denied. He gave an Allegation pleading the marriage of Mary and the deceased, which was admitted; but Sarah alleged she was appointed executrix by her proper name, and prayed probate to be granted to her. Thomas, son of Mary, denied her interest, and insisted that the description "wife" was more material than the Christian name, and that, if Mary was the lawful wife, probate ought to be granted to her. But the Court was of opinion that it sufficiently appeared whom the deceased intended to appoint executrix by describing her by the name of "Sarah," and as his

who had entered a *Caveat*, which had not been subducted, was produced to prove her son's Allegation. She was objected to, as being a party, and also because she had an interest in proving her son's legitimacy, and consequently her own marriage, and the Court was of opinion that she could not be a witness, for she was a party in the cause, as her *Caveat* had not been subducted: so that a person becomes a party in the cause by entering a *Caveat*, and, not having subducted it, could not be examined as a witness in that cause.

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These and other cases,—*Wage v. Ewen*,* and *Wilson v. Hayward*,†—all go to the same point, and to affirm the gene-

his wife, and decreed probate to her immediately, reserving probate as to the other executor till it should appear in the event of the suit which Thomas was the lawful son. May, 1737. *Repertorium*, 4 vol. 401.

It appears that, on warning the *Caveat* entered by Mary, no appearance was given for her; but a Proctor appeared for her son, and her *Caveat* not being withdrawn, she was described in the Court Books as a party, though she never appeared, nor did any act in the cause. A Trin. T. 1737. motion was made that her name might be struck out of the description of the cause; but her *Caveat* not having been subducted, the motion was rejected. She was afterwards produced as a witness to prove her son's Allegation, but was objected to as being a party, and also because she had an interest in proving her son's legitimacy, which would establish her own marriage. The Court (Dr. Bettesworth) was of opinion that she could not be a witness, for she was a party, her *Caveat* not being subducted, and her Answers might at any time be called for. She was also rejected on the ground of interest. *Ibid.* 501. Mich. T. 1737.

* Before the Delegates, 1740. The Court, on debate, allowed a person, who was an executor and a contingent reversionary legatee, but who had renounced all interest under the will, to be a witness in support of the will, though a *Caveat* was originally entered in his name. *Repertorium*, 4 vol. 512. *Wage v. Ewen.*

† In 1740. William Patten made a will, bequeathing the residue of his property to his daughter, Mrs. Wilson, and his grandson, Hayward, appointing the latter and Blythe executors, with a legacy of £10 each. Hayward alone proved the will, power being reserved to Blythe. Both executors were called, at the instance of Mrs. Wilson and her husband (executors in a former will), to propound and prove the latter will, or shew cause why theirs should not be pronounced for; and also to bring in an inventory. A Proctor appeared for the executors, and Blythe, the executor who had not proved, gave in a Declaration instead of an inventory, and by special proxy renounced. His renunciation was

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Hayward.

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ral doctrine of the Court, that a party in the cause cannot be examined as a witness, and in order to be so, must be dismissed.

There being, as it appears to me, no case to the contrary, I am of opinion, in this case, that these parties, as parties, are not entitled to be examined. If the Act of Parliament does apply, it must apply in all cases, and to all parties on the record. I am of opinion, from the examination of the cases, that a party, who continues to be a party in the cause, must be dismissed before he can be examined as a witness in the cause; and I am of opinion that these parties, having been cited to accept or refuse administration, and not appearing, are parties in the cause, and cannot be examined so long as they are parties in the cause.

It was said, in the Argument, that great inconvenience might arise from this doctrine, as an executor might make a selection of witnesses; but in this case Mr. Sanders had no option; he must cite all the next of kin, because, no executor and no residuary legatee being appointed, the next of kin are entitled to the grant in preference to any legatee, as there may be a residue: so that there can be no danger in this case of the administrator making a selection detrimental to parties entitled to the property.

I am of opinion that the depositions of these two ladies ought not to be published, but that an application ought to be made to the Court that they may be dismissed from the cause. I see no reason why next of kin may not be dismissed, as any other persons. These two parties have released all their interest, and I see no reason, *à priori*, why they are not entitled to be dismissed, which is the course that ought to have been taken in the first instance. It will be for the parties to consider whether they will make the application to the Court. I see no reason why such prayer should not be made, nor any reason why it should not be granted. At present, I direct, that publication of these per-

mitted, and he then prayed to be dismissed from being a party in the cause, he being the writer of the will, and a necessary witness to prove it. This was opposed, but he was dismissed, released his legacy, and was examined as a witness. Dr. Audley's Note. *Repertorium*, 132.

his evidence should not pass, and I shall suspend publication of the rest of the evidence.

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An Appeal was asserted on behalf of the party cited, but was subsequently waived; and on the first Session of Hilary Term, 1847, the Court was moved to dismiss the parties who had been examined from the suit, in order that they might be re-examined as witnesses, which motion, though opposed, was granted by the Court, which directed that they should be not merely re-sworn, but actually re-examined.

Proctors:—*Wadson*, for the party propounding the will; *Tatham*, for the party cited.

Judicial Committee of the Privy Council.

DECEMBER 5.

BARNES v. VINCENT AND OTHERS.—*Cause.*—This was a suit respecting the will of Mrs. Susanna Ireland, wife of Dr. Ireland, made in pursuance of a power vested in her by her marriage-settlement, commenced in the Prerogative Court of Canterbury, which rejected the Allegation propounding the will, on the ground that the facts pleaded shewed that the power had not been duly executed, the attestation-clause in the will being deficient, and parol evidence being inadmissible to supply the defect.* This Court, upon appeal, reversed the decision of the Prerogative Court, admitted the Allegation, and retained the Cause, directing evidence to be taken to prove the execution of the will, not looking at it as if it were the execution of a power.†

The will of a *feme covert*, made in pursuance of a power, appearing on the face of it not to have been duly executed, proved by parol evidence, and admitted to probate.

THEIR LORDSHIPS now, with consent and at the request of both parties, admitted the will to probate, the costs of all parties to be paid out of the estate, if any.

* 3 Notes of Ca. 628.

† 4 Notes of Ca. Supp. xxi.

Prerogative Court of Canterbury.

Bye-Day.

DECEMBER 12.

A will of a soldier in India, executed by a mark, without any proof of identity, the witnesses being dead or not forthcoming,—the paper having been transmitted officially from India to the East-India House,—under the circumstances, received.

IN THE GOODS OF WILLIAM PRENDERGAST, OTHERWISE PENDERGAST, DEC. — *Motion, ex-parte.* — The deceased, late gunner in the Horse Brigade Artillery, in the service of the East-India Company, on the Bombay establishment, died 6th April, 1843, in camp, at Allis-kasanda, in Scinde. He was in actual military service at the time of his death, which occurred during the campaign in Scinde, and thirteen days after the battle of Hyderabad, at which he was present. In July, 1845, Robert Prendergast, the brother of the deceased, was informed at the East-India House, upon inquiry, of his death, and that his will had been received there from India, and also that a sum of £68, belonging to his estate, had been remitted from India, and would be paid to his personal representative in this country acting under the will. On application at the East-India House, the original will was cut from the book in which it was recorded, and delivered to the Proctor of R. P. This paper was to the following effect:—

In the name of God Amen. I, Gunner William Prendergast [*sic*] of the 1st Troop H.A., Being sound in Mind but weak in Body, do hereby make my last Will and Testament. I Bequeath my Bank Money Gratuity to my Brother, Robert Prendergast, of Castle Town, County of Limerick. I also Bequeath to Farrier Patrick Prendergast, of the 1st Troop, H.A., the whole of my Effects, Pay, Arrears of Pay, Clothing, &c. &c. Given under my Hand, this 6 Day of April 1843.

+

Witnesses

Sergeant G. Massey

James Woods.

Robt. Baxter

Assist. Surgeon, 1st Troop H.A.

The cross at the foot was not stated to be the mark of the deceased, and upon inquiry at the East-India House, it appeared that Sergeant Massey, one of the witnesses, and

Assistant-Surgeon Baxter, were both dead, and nothing was known of James Woods, the other attesting witness. It further appeared that Patrick Pendergast, the legatee named in the paper (not related to the deceased), died 26th August, 1843. A letter was written and sent by Robert Pendergast to the officer commanding the 1st troop Bombay Horse Artillery, requesting information on the subject of the execution of the will, to which he received an answer from that officer, at Poona, informing him that all the persons who could depose to the person by whom the will was written were dead, except James Woods, who was in some distant part of the presidency.

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Pendergast,
dec.

The deceased left no other property than the £68 in the treasury at the East-India House (composed of his deposits in the Savings Bank at Bombay, and the amount of twelve months' batta for service in Scinde), and 104 rupees, the amount of his pay and allowances, and the produce of the sale of his effects, which had been placed to the account of Farrier Patrick Pendergast, agreeably to the will of the deceased.

The deceased was a bachelor, and left four brothers and two sisters, all living in Ireland, except one brother resident in New South Wales.

Jenner, Dr., moved for administration with will annexed *MOTION.* to Robert Pendergast, brother and one of the next of kin of the deceased, and a legatee named in the will. [PER CURIAM.—Where is there proof of identity?] I do not know that there would be any if there had been the words "the mark of William Pendergast." [PER CURIAM.—It would have shewn to some extent that he was the person who made the mark. Can I take upon me to say, in the absence of all proof, that this is the will of William Pendergast? Who paid the legacy to Patrick Pendergast?] It was paid in India.

SIR H. JENNER FUST.—This paper has been transmitted *DECEASED.* from India, as the will of this person, to the East-India House. There is some difficulty in the case, but I think, under the circumstances, the paper coming from the East-

Dec. 12. Indies, with some appearance of authority, and having been acted upon at the East-India House, I may receive it. Decree administration with the will annexed to the brother.

Prendergast, dec.

Nicholl, Proctor.

Where a testator in his will bequeathed his whole property for life to "his dear wife Elizabeth," his real wife Hannah, with whom he had long ceased to cohabit, being still alive; the Court refused, in her absence, upon the affidavit of the sister of Elizabeth Frost, to whom the deceased had been married *de facto* after his separation from his wife, to decree administration with the will to the aforesaid Elizabeth, as universal legatee for life.

IN THE GOODS OF JOHN FRANCIS LAMBERT, DEC.—
Motion, ex-parte.—The testator died 26th May, 1846, having made his will dated 16th of the same month, attested by two witnesses, without any clause of attestation, whereby he bequeathed his property in the following manner: "I now leave and bequeath to my dear wife, Elizabeth Lambert, the whole of my real and personal property during her natural life, and after that, to my son, Charles Lambert, and his heirs." It appeared by the affidavit of Sarah Frost, one of the witnesses to the will, that the testator in early life married a woman whose Christian name was "Hannah," and after the marriage they quarrelled and agreed to live separate and apart, and continued to live apart for seven years, when he married Elizabeth Frost, the sister of the deponent, on the 20th January, 1812, and from that time till the death of the testator, he and the deponent's sister lived and cohabited together as lawful husband and wife. It appeared further, from the same affidavit, that Hannah, the testator's first wife, was living at the date of his second marriage, and still survived; and the deponent stated that she well knew that the testator, by the words "my dear wife, Elizabeth Lambert," meant and intended her sister, he having, previously to making his will, as well as at the time of making it, declared that he intended to leave her sister all his property for her life.

MOTION. *Addams, Dr.*, moved for administration with will annexed to Elizabeth Lambert, otherwise Frost, the universal legatee for life.

DECREE. **SIR H. JENNER FUST.**—On the face of the paper, the testator has disposed of his property, *primâ facie*, to his wife and son,—I presume his son by this person, Elizabeth Frost. The affidavit of Sarah Frost, the sister of this per-

son, is to shew that the deceased intended to give the whole of his property to her sister, Elizabeth, for life, under the description of "his dear wife, Elizabeth Lambert;" but she states that a person answering to the description of the wife of the deceased was living at the time the affidavit was made, and she, *prima facie*, would be the person described as his wife. But the name is different, the name of the real wife being Hannah. The Court is asked to decree administration to Elizabeth Frost, in the absence of the first wife (the real wife), without giving her an opportunity of saying whether she would contest the will or not. There is another point. The witness, Sarah Frost, does not prove the due execution of the will; why she should not have proved the due execution, and why the other witness should not have joined in the affidavit, I do not understand. But can I, in the absence of the wife, decree administration with the will to a person described as the wife, who is not so, simply on the affidavit of the sister of this person? I must reject the motion.

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*Lambert, dec.*Motion re-
jected.*Hooks, Proctor.*

IN THE GOODS OF PHEBE BRADLEY, WIDOW, DEC. — *Where alterations unattested appeared on the face of a will, in the handwriting of the testatrix, and a codicil, dated seven-teen months after the will, was attached to the foot of it, but no evidence or information could be obtained as to whether the alterations were made before execution, or whether the codicil was attached to the will*
Motion, ex-parte. — The deceased died 30th July, 1846, having made her will 11th January, 1843, and thereof appointed R. D. and J. R. executors. There are several erasures in the body of this paper, words being written upon some of them, and some words are written in the margin, none of which are attested. At the end, there is this memorandum: "The erasures in this my will are made by my own hand. Phebe Bradley." Then follows the signature of the deceased (repeated), below the memorandum, opposite to the seal. The attestation clause is to this effect: "Signed, sealed, published, and declared by the said testatrix, and as for her last will and testament, of us, who, at her request, and in the presence of each, have hereunto subscribed our names as witnesses thereto." Then follow the signatures of three witnesses. A codicil, dated 21st February, 1845, signed by the deceased, and attested by two

DEC. 12. witnesses, without any clause of attestation, is attached to the foot of the will by sealing-wax. The purport of the codicil is to revoke a legacy bequeathed by the will, in the event of a debt, incurred by the legatee to the deceased since the date of the will, remaining unpaid at her death. *Bradley, dec.* The whole of the will, with the insertions, is in the deceased's handwriting, and was duly signed by her in the presence of the witnesses; but they are unable to say whether the alterations and first signature were made before the execution, as they did not notice them, and the deceased said nothing about them. The codicil was duly executed, but the surviving witness does not recollect whether it was annexed to the will at the time of the execution, and cannot say any thing respecting the alterations in the will. The will and codicil were found by one of the executors, shortly after the deceased's death, in a bureau in her bed-room, in their present plight. No information (beyond what is contained in the memorandum at the foot of the will) could be obtained as to the time when the alterations were made.

MOTION.

Addams, Dr., moved for probate of the will and codicil, with the alterations appearing in the will. The presumption strongly is, that the alterations were made in the will before the execution of the codicil, and if so, the codicil would republish the will in the state it was in at the date of the codicil. If there had been no codicil, according to the late decision of the Judicial Committee in the case of *Cooper v. Bockett*,* the presumption would be against the alterations. But a longer period elapsed between the date of the will and that of the codicil, than between the date of the codicil and the death of the deceased. [PER CURIAM.—Can I enter into these speculations?] How the will originally stood cannot be ascertained, but to pronounce against the alterations will be to deprive some of the parties of their legacies altogether.

DECREE.

SIR H. JENNER FUST.—When or by whom the codicil was

* 4 Notes of Ca. 691.

to the will does not appear, nor are the witnesses
 speak to any of the alterations being made in the
 he time of its execution. The name "Phebe Brad-
 the end of the memorandum at the foot of the will,
 ker-coloured ink than that in which the signature to
 is written. The presumption of law, since the
 of the superior Court, in *Cooper v. Bockett*, is, that
 erations, being unattested, in the absence of any evi-
 at they were made before execution, were made
 and they are consequently invalid. But annexed to
 , at present, is a codicil dated 21st February, 1845,
 i this paper been attached to the will at the time it
 cuted, the Court might receive it as a republication
 will; but the surviving witness does not recollect
 it was so or not. It was executed seventeen months
 he death of the deceased, and I might indulge a con-
 that it was annexed to the will at the time of execu-
 and most probably it was: but I cannot indulge in
 are now; I have no evidence that it was so annexed,
 annot decree probate of the will as it stands. I must
 he motion.

DEC. 12.
Bradley, dec.

Motion re-
 jected.

us, Proctor.

THE GOODS OF WILLIAM DUNN, DEC. — *Motion*,
 :—The deceased died 10th October, 1840, intestate,
 a widow, who was of unsound mind, and three bro-
 gard, Dr., moved for administration to a brother, in
 nce to the widow, citing *Re Williams*.*

Where the
 widow of a de-
 ceased intes-
 tate was of
 unsound mind,
 administration
 granted to a
 brother of the
 deceased.

H. JENNER FUST.—The deceased, a lieutenant in
 y, died in October, 1840, intestate, leaving a widow
 ee brothers, his only next of kin. Mrs. Dunn, the
 , in 1835, was confined in a lunatic asylum in Ire-
 land in 1843, she was removed to Prince Edward's
 and she still remains there in a state of insanity.

DECEASED.

* 3 Hagg. E. R. 217.

Dec. 12.

Dunn, dec.

She has a pension as the widow of an officer in the navy, and in 1842, a certificate from a medical gentleman at Prince Edward's Island was received at the War Office, stating that Mrs. Dunn was insane and incapable of managing her own affairs, which was acted upon at the War Office, and her pension has been paid up to September last, upon a certificate that she was still confined as a lunatic in an Asylum at Prince Edward's Island. There is an affidavit from the superintendent of the Lunatic Asylum at Dublin, a medical gentleman, stating that this lady had been under his care, and that, in his opinion, the disease she laboured under was incurable. The question is, whether the Court should grant administration to the brother in the absence of the widow, and without any Citation calling upon her to appear, if she were of sound mind, and object to the grant and claim it herself, if she thought fit. Now the Act of Parliament gives a discretion to the Court, to grant the administration to the widow or to the next of kin: so that there is statutory discretion left to the Court. But it is always accustomed to give priority to the widow to accept or refuse administration, or to shew cause why it should not be granted to the next of kin; and the first question is, whether the Court is satisfied with the proof before it that Mrs. Dunn is still of unsound mind. I am of opinion that the evidence is satisfactory. There is the evidence of the medical gentleman at the Lunatic Asylum at Dublin, and he is of opinion that her disorder is incurable, and though there is no affidavit from Prince Edward's Island, there is the certificate of the governor, with which the War Office is satisfied. I am of opinion that there is sufficient proof that this lady is at this time in such a state that it would be improper to trust her with the property. There is another circumstance which has weight with the Court, namely, the administrator will be in this country and able to give security, whereas the widow is in Prince Edward's Island. Under the circumstances, I am of opinion that I am in a condition to grant administration to the brother, without any further information of the state of this lady. Decree administration to the brother, on his giving justifying security; it being

Administra-
tion granted to
the brother.

derstood that the Court would not depart from the usual actice unless there was sufficient ground for setting the dow's claim aside.

F. H. Dyke, Proctor.

DEC. 12.

Dunn, dec.

IN THE GOODS OF MARIA SOPHIA PHILIPPA MONTMERY, WIDOW, DEC.—*Motion, ex-parte.*—The deceased ed at Aix la Chapelle, 13th September, 1846, leaving an ly child, an infant son, in the third year of his age. Being a very delicate state of health, in August, she proceeded

Dover, on her way to the Continent, accompanied by her ild and Miss M., its paternal aunt, and was joined at over by Lady Noel Byron, her confidential friend, with hom she had been residing for several weeks previously, id they all remained together at Dover for some days. The ceased expressed to Lady Byron her anxiety respecting ie disposal of her property, and mentioned to her the parti- ilar persons she intended to benefit, as well as the extent of ie benefit to each, and the names of the persons to act as uestees, and requested Lady Byron to procure an instru- ment to be prepared by which her intentions would be car- ed into effect. Lady Byron accordingly applied to G. T., solicitor at Dover, and gave him instructions, as she had received them from the deceased, to prepare an instrument greeably to the deceased's wishes, and being aware of her xtremely delicate state of health, and her nervous appre- ension on the subject of death, Lady Byron, of her own ccord, requested G. T. to avoid the term "will" in the ocument, and he prepared from the instructions so given a lisposition of the deceased's property, and sent it to Lady yron. On producing it to the deceased, Lady Byron did ot read it all over to her, for the before-mentioned reasons, ut merely the bequests and general contents, and having ent for the physician who attended the deceased, the dispo- sition was executed by her, in the presence of Lady Byron and the physician, who subscribed their names thereto as itnesses. The document commences in the form of a deed, 'Know all men that I, Maria Sophia Philippa Montgo-

Where a tes-atrix, in ill-health, having desired an instrument to be prepared for the disposal of her property, which, owing to her nervous apprehension on the subject of death, was drawn up without mention of the word "will," and in the form of a deed, but unsealed, and directing trusts to be executed after her death: — Held, that the instrument could not have effect as a deed, but might operate as a will, and probate granted to the trustees as executors according to the tenour.

DEC. 12.
—
Montgomery,
dec.

mery, &c. do by these presents give, grant, transfer and set over unto H. B. J., and W. P. (except as hereinafter excepted) all and singular my goods, chattels, moneys, securities for money, and all other my personal estate and effects whatsoever, &c. upon the trusts following." It then directs the trustees, "as soon as conveniently may be after her decease," to collect and convert into money her personal estate, and pay thereout her debts, and certain legacies (including £25 each to themselves), and to transfer the residue to her son. At the end is the following clause: "Signed by the said Maria Sophia Philippa Montgomery in the presence of us, who in her presence, at her request, and in the presence of each other, have, at the same time, put our names hereto as witnesses: the Christian name 'Sophia,' prefixed to 'Montgomery,' having been first erased, and the name 'Sophia' interlined between the other Christian names, 'Maria' and 'Philippa,' throughout the deed." The document has no seal.

The deceased's property in England amounted to about £400; but she was entitled under her late husband's will to arrears of rent in Ireland amounting to £3,000, and also to property of some extent in Switzerland.

MOTION.

Sir J. Dodson, Q.A., moved for probate of the paper as the will of the deceased to the persons named therein trustees, as executors according to the tenour. The document cannot operate in any other way than as a will; it directs the collection of her effects "after her decease," the payment of her debts and legacies, and bequeaths the residue to her son, and it is executed in the form required for wills.

DECREE.

SIR H. JENNER FUST. —It would appear, *prima facie*, that the paper was not intended as a will, but as a deed, to convey the property to two gentlemen in trust, and it could not be admitted to probate in common form without the sanction of the Court. But the directions are not to be carried into effect until after the death of the deceased, and, notwithstanding the form of the paper, it is clear that it cannot operate as a deed. If there had been trusts to be executed immediately, or in the lifetime of the testatrix,

though it could still not have effect as a deed, it would not operate as a will. What are the trusts? Why that these gentlemen, "as soon as conveniently may be after my decease," are to collect the proceeds of her personal estate, pay her debts and the legacies she has specified. It concludes, "In witness whereof, I, the said Maria Sophia Philippa Montgomery, have hereunto set my hand this 4th day of September, 1846;" and then there is an attestation-clause in the form not of a deed, but of a will. Under the circumstances, I am quite clear that the paper cannot have effect as a deed, and may have effect as a will, for all the trusts are to be executed after the death of the deceased. The question then is, whether the parties named as trustees are executors according to the tenour, or universal legatees in trust. Looking at the whole of what they are to do, I think, under the circumstances, the acts are to be done by them as executors, and not as trustees generally, and therefore I decree probate to them as executors according to the tenour of the will.

DEC. 12.

—
Montgomery,
dec.

Probate granted to the trustees as executors according to the tenour.

Stolz, Proctor.

High Court of Admiralty.

DECEMBER 17.

Ext. Court Day.

THE "GAZELLE."—*Cause, by Act on Petition.*—In this case, the schooner *Despatch*, of 88 tons, on a voyage from Sunderland for Ipswich, laden with coals, when about ten miles to the southward of the Dudgeon Light, about 4 o'clock on the morning of the 25th of January last, was run into by the steamer *Gazelle*, proceeding from London to Hull, and sank about 9 o'clock the same morning. The wind was S. and by W. to S.S.W., blowing rather stiffly; the night was dark, and the weather thick, with rain. The

Collision. — A steam-vessel, proceeding at the rate of nine knots an hour, in a dark night, meeting a sailing-vessel, close-hauled on the starboard tack, and, porting her helm, struck and sunk

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Gazelle.

the sailing-vessel, made responsible for the loss.—Construction of Trinity-House Rules.

schooner was close-hauled on the starboard tack, standing off to the eastward, and going through the water at the rate of three knots an hour. The course of the steamer was N.N.W. $\frac{1}{4}$ W.; she had her mainsail, foretopsail, and jib set, and was making nine knots an hour. The schooner shewed a light, hailed the steamer, and, just before the collision, starboarded her helm; the steamer ported hers, and struck the schooner on the starboard bow, the crew of the latter getting on board the steamer. The owners of the schooner sued the *Gazelle* for the damage, and the question was, which party, if either, was to blame.

The Court was assisted by Trinity Masters.*

ARGUMENT.

Jenner, Dr., for the Despatch.—It is admitted by those on board the steamer that our light was seen in sufficient time to have avoided the collision, which was caused by the unseamanlike and careless conduct of those on board the *Gazelle*, in proceeding at such a rate in such a night, in not keeping a good look-out, in porting her helm, or in not porting it sooner, and in not easing or stopping her engine when another vessel was seen in such close proximity, of whose course she was uncertain. By porting her helm, she crossed the schooner's bows, and, in fact, ran her down. The *Despatch*, on the other hand, kept her course, as she ought to have done, till the latest moment, just before the collision.

Deane, Dr., on the same side.

Addams, Dr., for the Gazelle.—It would be very inconvenient if the Court laid down a rule that instantly, upon the appearance of a light, a steamer must stop her engines. The two vessels were coming as near as possible end-on, and, in that case, according to the spirit of the Trinity-House Rule, both should have ported their helms. The *Gazelle* did so, and if the *Despatch* had done the same, it was impossible that a collision could have taken place. The schooner was thirty-seven years old, and very hard to wear on the starboard tack.

R. Phillimore, Dr., on the same side.

* Captain Weynton and Captain Farrer.

DR. LUSHINGTON (addressing the Trinity Masters).—Gentlemen, I must necessarily occupy a few minutes of your time, in order that we may come to a clear understanding of what are the Trinity-House Rules with regard to the navigation of vessels, and whether I have duly comprehended them on former occasions, or been in error. As at present advised, I am not inclined to think I have committed any mistake, not from confidence in my own judgment, but because my observations have always been made in the presence of Elder Brethren of the Trinity-House; and I have no doubt that, if I had stated any thing contrary to their opinion, of what was right and fit to be done, in conformity to those Rules, they would have done me the favour of correcting me at the time, and if I now fall into any error, I entreat you to state what that error is; because the great object to be attained is to discover the truth, especially for the safety of the navigation of ships of this country.

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SUMMING UP.

Therefore, we must, for a moment, divest ourselves of the peculiar circumstances of this case, and we will take the case to be simply this:—Here is a merchant-vessel, sailing close-hauled, meeting with a steamer, and the question is, what is to be done under these simple circumstances? Now, with regard to the Rules laid down by the Trinity-House, let us see whether any of them does, either directly or by fair implication, lay down any and what rule as applicable to such a case.

The first observation is this:—"Whereas the recognised rule for sailing-vessels is, that those having the wind fair shall give way to those on a wind"—I apprehend (if I am wrong, I pray you to correct me) that "giving way" means getting out of the way, by whatever may be the proper measures, whether by porting or starboarding the helm; that they shall give way, and let the other pursue her course. That is the case with respect to sailing-vessels; those having a fair wind shall give way to those on a wind. The next is, "That when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand." Here the two vessels are precisely in

The Trinity-House Rules.

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Gazette.

the same circumstances, and some rule must be established, and I apprehend this was the most convenient rule, that the parties might be under no mistake, and there might be no dodging to the one side or the other. The next rule is, "That when both vessels have the wind large, or abeam, and meet, they shall pass each other in the same way, on the larboard hand"—that, no doubt, was for exactly one and the same purpose, to avoid any uncertainty as to what was to be done: "to effect which two last-mentioned objects, the helm must be put to port." So much as to what are the recognised rules of navigation. Now comes another rule:—"And as steam-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack, it becomes only necessary to provide a rule for their observance, when meeting other steamers or sailing-vessels going large." It is here stated to be an admitted fact, as indeed must be the case, that steam-vessels are always to be considered as vessels sailing free; and then it also states, as an admitted fact, that, if a steam-vessel meets a sailing-vessel on a wind, she ought to give way, whether the vessel be sailing on the starboard or the larboard tack. Then the Trinity-House went on to provide for those two other circumstances, namely, where a steamer meets another steamer, or a sailing-vessel going large, then they prescribe the following rule, which does not embrace all circumstances, or the present case:—"When steam-vessels on different courses must unavoidably or necessarily cross so near that, by continuing their respective courses, there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other." Now, that has nothing to do with this case. "A steam-vessel, passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand." This vessel was not in a narrow channel; this rule, therefore, does not apply. Which rule has to do with the present case? The passage I read before—"As steam-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing-vessels on a wind on either tack." Why,

stating, as an admitted proposition, that a steam-meeting a sailing-vessel on a wind, on either tack, is to give way ; and the simple question is, what is the meaning of the term "give way ?" I know of no rule, provision, or expression, that ever has fallen from any gentleman whom I have had the honour to be assisted, implying that "giving way" means "putting the helm to port," in all circumstances ; on the contrary, I apprehend (and in the cases I have stated it to be my impression) that it is according to the circumstances, they were to give porting or starboarding the helm, as the case might require.

Do not let it be understood that there is any difficulty in construing the Rules ; as far as they go, they are plain and clear. There may be, and there is, an omission, in providing, in express terms, what a steamer should do in case of meeting a sailing-vessel going large. That is the present case ; therefore I need not enlarge upon it.

But be so, let us consider what are the circumstances of the present case. The circumstances of this case, its general features, do not appear to me to be in dispute on either side. The *Despatch*, a vessel laden with coals, was proceeding, on starboard tack, to the E., the wind being at that time, blowing from both parties, S. and by W. to S.S.W. ; it being on behalf of the *Gazelle*, that the wind was blowing from the S. and by E. to S.E. ; and that the weather was dark and thick, with rain. The statement of the *Gazelle* was, according to her own statement, that she was proceeding at the rate of between nine and ten knots an hour, and was about ten miles southward of the Dudgeon Light. This being so, and the two vessels approaching each other, the statements, in all respects, no doubt vary ; but I will first take the statement originally made in the office of the owners of the *Despatch*, at Hull. The statement of those on board the *Gazelle* in the first instance, after having stated the facts I have mentioned, was this : "The people on board the *Gazelle* saw the light on the larboard bow, and the mate of the *Despatch* (Jameson) ordered the seaman steering to port the *Despatch*, which was done ; immediately after this, the *Despatch* and the *Gazelle* came in contact, the *Despatch* was damaged, and the *Gazelle* was damaged."

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The circumstances of this case.

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schooner's bowsprit, striking the *Gazelle* on the larboard rail, about ten feet before the paddle-box. This is their own statement of the occurrence, and it will be observed, with reference to the shewing of one light, and of one light only, on approaching—I do not mean in the slightest degree to impute to either party the having unduly kept back the fact—there were, in truth, two lights seen; one, which went out, and another that replaced it. Yet, according to this statement, the moment a light was seen, it would appear, the helm of the *Gazelle* was put to port, and immediately afterwards, the collision took place in the manner stated.

The original statement on the part of the *Despatch*, varies not at all, as to this particular, so far as relates to the *Gazelle*; but it states what she herself did—which is undoubtedly an ingredient in this case to be duly considered—that her helm was put hard to starboard. There is another point: the persons on board the schooner unquestionably called out to those on board the *Gazelle* to port her helm; but it is expressly denied by those on board the steamer that any such hailing was heard at all; and consequently, if it was not heard, it could not by possibility have influenced the movements of those on board the *Gazelle*; so that, if it was an error of those on board the schooner, it was an error that was not, in any degree, the cause of the collision.

Questions.

Now, the first question is, whether, in such a night as this, described by those on board the *Gazelle* to have been a dark and misty night, when it was very difficult to discover objects, the *Gazelle* being in that part of the sea which is frequented so much by colliers, it was consistent with prudence, and a just regard to the safety of the lives and property of others, to proceed at such a rate? That is one question; the next is more of a nautical question: when they did see the light displayed by the schooner, ought the *Gazelle* to have ported her helm, or to have pursued any other and what measure?—whether or not, upon perceiving this light, and consequently being cognizant that some vessel must be in the close vicinity, she ought either to have eased her engines, have stopped her engines, or put the

to starboard or port?—I put all the four—or whether were justified in simply putting her helm to port in the manner they did? If you are of opinion that this was an erroneous measure, and that they either did that which they it not to have done; or omitted to do that which they it to have done; in either case, the *Gazelle* must be possible, to a certain extent at least, for this damage.

much for what relates to the *Gazelle*. With regard to schooner, if you are of opinion that the helm was put to board before there was any necessity for, or propriety in, taking that step, and if you can bring yourselves to the conclusion that the so putting the helm of the schooner to board contributed to this collision—because, if it was not cause of the collision, and did not contribute towards it, mere error of doing that which does not affect the question can produce no result—the consequence in law will be, both vessels are to blame, and the loss must be divided between them. Have the kindness to inform me if, in your opinion, the *Gazelle* was to blame, and alone to blame?

APTAIN WEYNTON.—With respect to the *Despatch*, we are of opinion that the order given to starboard the helm, and act of collision, were simultaneous, and we must exonerate the schooner from all blame. We believe that the schooner acted very imprudently in carrying so much sail, and going with such speed in a thronged thoroughfare; and not take the necessary measures to avoid the collision.

PER CURIAM.—I pronounce for the damage.

JUDGMENT.

Factors:—*Wadeson*, for the party proceeding; *Loveday*, for the *defendant*.

END OF MICHAELMAS TERM, AND OF THE
SITTINGS AFTER TERM.

Admissions during the Term:—

AS ADVOCATE.

NOV. 2.—WILLIAM FRANCIS DOBSON, Esq., D.C.L., of Trinity Hall, Cambridge.

AS PROCTOR.

NOV. 19.—GEORGE HENRY BROOKS, Esq., Not. Pub.

DEC. 17.

Gazelle.

HILARY TERM, 1847.

High Court of Admiralty.

1st Sess.

JANUARY 13.

Salvage. — **THE "WILLIAM."**—*Cause, by Action Petition.*—This was a claim for salvage by the masters, owners, and crew of two yawls, the *Leveret* and the *John*, belonging to Great Yarmouth, for services rendered to the *William*, a vessel of 282 tons, and a crew of 11 men, bound from Archangel to London, with a cargo principally of wheat, which, on the morning of the 7th of October last, got upon the north-west part of the Scroby Sand, a strong flood-tide setting to the S.E., and the wind blowing from the S.W. She was descried by the *Leveret*, of 12 tons and 7 men, which was cruising about in the Gockle-gat, to assist vessels in distress, and which went to her, when some of the men jumped on board, and attempted to bargain for their assistance, but no contract was made. The services of the yawlmen being accepted, they carried out a kedge-anchor of 2 cwt., and attempted to heave upon it, but the anchor being too light, it came home. They then signalled for further assistance, and the *John* came up. In the meantime, a heavier anchor had been carried out, and, all hands heaving upon it, the vessel came off the sand, and proceeded to Yarmouth. The weather was fair, and the service lasted in the whole about two hours and a half. The value of ship, cargo, and freight was £3,820. The salvors demanded £500. The owners first tendered £30, which they increased to £100; this was refused.

Sir John Dodson, Q. A., and Robinson, Drs., were for the salvors; Jenner and Bayford, Drs., for the owners.

DR. LUSHINGTON.—With regard to the services of the *Leveret*, there can be no doubt that the persons on board that vessel hold the highest rank of merit. I think the whole merit of those in the *John* concentrates in this,—that they obeyed the signal, and came on board the vessel, and were occupied, at the utmost, for ten minutes in heaving on the cable, and so getting off the vessel. I agree with the observation of Counsel, that it was not, in the opinion of the salvors themselves, a case of imminent danger, otherwise it would have been the bounden duty of the *Leveret's* men to have accepted without a moment's delay the assistance proffered to them by another vessel, the *Storm*.

JAN. 13.

William.

JUDGMENT.

What are there in this case of the ingredients of salvage which constitute a claim to any considerable extent? First, the value of the property, which is considerable. But, on the other hand, I am utterly at a loss to discover that there was the slightest risk to any one of the salvors; or that there was any extraordinary labour or skill on their part, and as to the time occupied, it was very brief, not exceeding two hours and a half. I retain the opinion I originally had on reading the papers, that the tender was an adequate tender, and I exceedingly regret to see, when there is such a tender, that farther attempts should be made, on the part of the salvors, by a suit in this Court, with a view of extorting a larger sum than the parties deserve. I, therefore, pronounce for the tender.

Tender pronounced for.

And *Jencks* asked for costs.

Costs.

Sir J. Dodds.—If the salvors are condemned in the costs, they will have nothing.

PER CUNLIFFE.—I have considerable difficulty on the subject of costs. In ordinary cases, the rule of the Court of Admiralty has been this; if a tender is made and rejected, which is afterwards pronounced sufficient, it ought to be followed by condemnation of the salvors in the costs, and no doubt, if I look to the practice of other Courts,—I allude particularly to the opinion expressed by Lord Cottenham and the Master of the Rolls,—costs are given not with a view of punishment, but as a matter of justice to the other party. I have considered how far this doctrine is applicable

Jan. 13.

William.

to cases of salvage, and I confess I have great difficulty in applying it, with all its rigidity, to such cases; for this reason: in the very nature of salvage services, there is something so loose and indefinite, and so difficult to be determined by the best constituted minds, when looking at their own case, that I am not inclined to press the doctrine to its full extent. Where there has been an offer on the face of the proceedings so large that it ought to have been accepted, I must administer justice in conformity to the rule I have mentioned. In the present case, however, whilst I certainly think the tender ought to have been accepted, yet, at the same time, looking at the value of the property and all the circumstances, I do not think I ought to deprive the salvors of all reward; nor do I think it would be for the interest of the public if I were to do so; because it is desirable to hold out a degree of extra-encouragement, if I may so say, for the preservation of property. Upon the whole, therefore, in this case, though it is with some doubt, I do not condemn the salvors in the costs.

Not decreed.

Proctors:—*W. Townsend*, for the salvors; *Jenner*, for the owners.

Where a vessel had become derelict, but was afterwards recovered by the owners, and was subsequently taken possession of by the Receiver of Droits, under the Act 9&10 Vict. c. 99, who refused to relinquish possession until his charges were paid, the Court declared it had no power to interfere, having no jurisdiction over the Receivers.

THE "TRITONIA."—*Motion, ex-parte.*—On the 27th November, 1846, the schooner *Tritonia* sailed from Cardiff, in Wales, with a cargo of railroad iron, for Wells, in Norfolk, consigned to Messrs. Brereton, of Blakeney, six miles from Wells. On the 18th December, at 6 o'clock P.M., the master and crew ran her on shore to the westward of Blakeney, and, taking to their boats, abandoned the vessel and cargo, and landed at Waybourne, six miles to the eastward of Blakeney. Some Waybourne fishermen pushed off, and at 6 o'clock next morning, discovered the schooner on the bar of Blakeney harbour, and boarded her. The same morning (the 19th) Messrs. Brereton, the consignees of the cargo, hearing that the vessel was on the sand, sent down a number of men to assist in getting her off. A quantity of the iron was taken out and carried above high-water-mark on the beach, and Messrs. Brereton sent their own steam tug

assist in getting the vessel afloat, but they could not succeed in doing so that day. On the 20th, the vessel was rather lightened, and on the 21st, the steam-tug towed her off and took her into Blakeney, where the master (being art owner) and crew, who had arrived at Blakeney on the 20th, took possession of her, and Messrs. Brereton immediately commenced having the cargo discharged. On the morning of the 22nd, twenty-four hours after the vessel and cargo had been got into port and in possession of her owners, Mr. S. P., of Great Yarmouth, accompanied by a Notary Public, arrived at Blakeney, and stated that he was Deputy Receiver of Duties, and claimed, under the Wreck and Salvage Act, to seize both ship and cargo, as having been Derelict, and the Waybourne fishermen authorized the Notary Public to send to London for an Admiralty Warrant on a cause of salvage, the Blakeney salvors refusing to join. Mr. S. P. turned the master and crew out of the vessel, and seized both it and the cargo. The vessel and the cargo were arrested at the suit of the Waybourne fishermen,

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Tribuna.

in a cause of salvage. Bail being given, a *Supersedeas* issued and was read on board the schooner, but Mr. S. P. refused to obey it, and kept possession of both ship and cargo, until a demand of £70. 3s. 6d., the particulars of which were contained in an Account delivered by him to the owners, on the 12th January, was paid. The value of the ship and cargo was £1,350.

1846.
Dec. 24.

Addams, Dr., brought the foregoing circumstances before the Court, as detailed in the Proctor's Case, which concluded

1847.
Jan. 1.

to draw a bill of sale, and to deliver a certificate of capture to the vessel.

The principal charges in this Account were the following:
 The cost of men and horses being employed in working the cargo on the beach to a place of safety £7. 7. 0
 Cash paid men for bringing the cargo from beach to the quay 9 10 0
 Per-centage on the value of ship and cargo, £1,350 ... 50 0 0

Answer, a derelict found in the Bristol Channel, complaint was made of the amount of the Receiver's charges; but the Court said, "The Act gives me no power to interfere."

MORRIS.

Dec. 1.

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Tritonia.

with a suggestion for an attachment against Mr. S. P., for contempt in refusing to obey the Admiralty *Supersedeas*.

PER CUB.

DR. LUSHINGTON.—The question is, how far I have jurisdiction to interfere. What is the effect of my *Supersedeas*? Merely to supersede the Warrant before issued from the Admiralty Court. [Addams.—Yes, but Mr. S. P. holds possession of the property.] Have I any jurisdiction in the matter? [Addams.—You may decree possession of the vessel.] I cannot do it summarily. Where, under a Warrant from this Court, a vessel is arrested, if I issue a *Supersedeas*, it supersedes the Warrant. But this is a matter of a totally different kind. It is not said that there has been any resistance to the *Supersedeas*; it is another claim from another quarter. [Addams.—The question is, whether, Mr. S. P. being improperly in possession of the ship, the Court may not decree possession to the owners, and if he refuses, pronounce him in contempt. Never was such a thing heard of as a vessel being regarded as Derelict because she had been Derelict.] The question is, what jurisdiction have I? I have no jurisdiction over the Receiver. I think your true remedy is by representation to the Lords of the Admiralty, and bringing your action if the vessel is improperly retained. There has been no resistance to the *Supersedeas*; if there had, I would have attached the party.

Motion refused.

The owners paid the demand, under protest.
F. Clarkson. Proctor.

Prerogative Court of Canterbury.

1st Sess.

JANUARY 15.

Where a will had been written, from the dictation of the

IN THE GOODS OF WILLIAM JOHNSON PARLOW, DEC.—
Motion, ex-parte.—The deceased died in December, 1848. In the preceding month, he requested G. A. to write his

, and then produced to him a lithographed "Form of a will where the Property of Testator is given to one or more persons absolutely;" G. A. proceeded, accordingly, to fill the blanks therein from the deceased's dictation; but the deceased wishing to give some further legacies, and as being not sufficient room on the first side of the paper, A. opened the sheet, and wrote various bequests (from the deceased's dictation) on the second and third pages, and having so done, he made a reference by an asterisk (*) in the margin of the first page (meaning to refer to the writing on the second and third pages), and also a corresponding reference at the end of the third page. He read all he had written, and pointed out the references, to the deceased, who expressed himself perfectly satisfied, and took possession of the paper. On the 11th November, the deceased produced the same to the said G. A. and two other persons, and requested them to witness the execution thereof; then, at the same time pointing out to them the writing on the second and third pages, and also the reference thereto on the first page, and he then, in their presence, executed the will by signing his name in the blank space left in the attestation-clause at the end of the first page, and the three witnesses signed their names under the attestation-clause on the first page, as witnesses to the execution.

The will read, therefore, as follows: On the first side was a bequest to Mrs. S. T. of £100, and likewise of the deceased's furniture, money, securities, "and all and every other his estate and effects whatsoever and wheresoever, both real and personal, whether in possession, reversion, remainder, or expectancy, for her own use and benefit absolutely." Then came the appointment of T. F. T. as executor; then the *testimonium*-clause: "In witness whereof, I, the said William Johnson Parslow, have to this my last will and testament set my hand, the 11th November, 1846;" then (lithographed) the attestation-clause: "Signed by the testator, William Johnson Parslow, in the presence of, present at the same time, who have hereunto subscribed our names as witnesses in the presence of the testator and of each other:" the name "William Johnson Parslow"

JAN. 15.

Parslow, dec.

deceased, upon a lithographed form, which did not afford room on the first page (at the foot of which was the attestation-clause) for all the bequests, and they were contained on the second and third pages, the only signature of the deceased being inserted in the blank in the attestation-clause,—a reference being made by an asterisk from the first to the third page,—the Court refused probate, the will not being signed at the foot or end.

JAN. 15. being in the deceased's handwriting. At the left hand, on the lower part of the page, was an asterisk, and at the bottom, under the names of the witnesses (which were in the place where the deceased's signature should have been), were the words "(Turn over)," and the second and third sides of the paper were filled with bequests, at the end of which appeared:—"And I nominate, constitute, and appoint Mr. T. F. T. to be my sole executor, in reference to which it will be seen in the first page, with (*) annexed."

Parslow, dec.

MOTION.

Waddilove, Dr., moved for probate of the will, as contained in the first, second, and third pages, to the executor named therein; citing *Re Carver*,* and *Re Gore*,† in which the Court had held that, although the signature was not at the foot, it was at the end of the will. [PER CURIAM.—How can this be at the end of the will? It would be going a long way to say that a signature in the first page, the writing being continued to the third page, was yet at the end of the will.] In the case of *Woodington*,‡ the signature was in the attestation-clause. [PER CURIAM.—Which contained the words, "signed by me."] The signatures, by means of the connection by the asterisk, might be considered as placed at the end of the will.

DECREE.

SIR H. JENNER FUST.—The great difficulty is, what I am to do with this paper at all; how much I can pronounce for as the will of the deceased. This is one of the disadvantages of using printed copies of a form of a will, by which parties are misled. If the deceased in this case had taken the trouble to draw out his will with his own hand, there would have been no difficulty, except with respect to the attestation-clause. In the first page of the will, there is an absolute bequest to Mrs. T. of all the deceased's property. Then comes the *testimonium*-clause, "In witness whereof," &c., and then the attestation-clause, a blank being left in the lithographed form for the name of the testator, and his signature is inserted in the blank space left in the attesta-

* 1 Notes of Ca. 276. 3 Curt. 29.

† 2 Notes of Ca. 479. 3 Curt. 758.

‡ 2 Curt. 324.

tion-clause ; and there are the signatures of three witnesses. At the bottom are the words, "Turn over," and on the left-hand margin is an asterisk, by way of reference ; and when we turn over,—after the whole property had been given to Mrs. T.,—there is a disposition of a portion of the property, so that Mrs. T. is to take only what remains of the property after a large portion had been given to others. There is no signature to this part of the will, except *referendo*. How is it possible I can say this paper is signed at the foot or end, and pronounce that the second and third pages form part of the will ? I cannot put such a construction upon the Act. This is the misfortune of using a form made out by persons apparently ignorant of the rules and principles upon which this Court proceeds. In some similar cases, the Court has held that the will may be pronounced for as far as the signature goes ;* in one case,† there was only the appointment of an executrix after the signature, and the Court rejected that clause ; but here I cannot pronounce for the first page of the will, as it was clearly not the deceased's intention to give the whole property to Mrs. T. I am of opinion that the Court must reject this motion, and if the parties think that the paper is entitled to probate, they must propound it, and examine witnesses.

JAN. 15.

*Parlow, dec.*Motion re-
jected.*Jennings, Proctor.*

IN THE GOODS OF JOHN MORGAN, DEC.—*Motion, ex parte.*—The deceased died 20th November, 1846, leaving brothers and sisters, his only next of kin. By a paper, dated 4th March, 1833, purporting to be his will, and attested by three witnesses, he appointed his sister, Mary Morgan, universal legatee, who, however, had executed a proxy, declaring that she would not propound this paper, of which she was executrix according to the tenour, and consenting that administration should be granted to one of her brothers, as if the deceased was dead intestate.

Addams, Dr., moved to that effect.

Where a party named universal legatee in a will, being executrix according to the tenour, refused to propound it, and consented to administration being decreed as in a case of intestacy, the Court rejected a motion for such administration.

* *Keating v. Brooks*, 4 Notes of Ca. 261. *Re Jones*, *ibid.* 532.† *Re Sutton*, 4 Notes of Ca. 48.

[had] pleaded that, some time prior to the 17th January, 1845, the Promoter addressed to the Bishop of the diocese a letter, now remaining in the Registry of the Vicar-general of the Archbishop of Canterbury, to whom it was officially transmitted, but of which a copy or inspection had been denied to the party proponent, wherein the Promoter presented certain charges against the party, which (as would appear as the result of the proceedings in this cause) he had not even a pretence for making, and for the support of which he could not rely upon the testimony of any one witness produced in support of the Articles which have been exhibited in his behalf. This part of the Allegation was rejected by the Court, as not relating to the cause. A motion was now made, on behalf of the party proceeded against, for this letter, and all papers in any manner whatever relating to the cause in the hands of the Vicar-General.

Adams, Dr. for the party proceeded against.—Application was made to the Bishop for a copy of the letter of accusation sent by the Promoter to the Bishop. He replied that the letter had been delivered to the Archbishop of the province, who, under the Church Discipline Act (3 & 4 Vict. c. 86, s. 24), acted as Bishop of the diocese in this case. The Registrar of the Vicar-General was thereupon applied to for the letter, or a copy, who declined to comply with the application, as the letter, not having been produced before the Commissioners of Inquiry, did not form part of the proceedings; adding, however, that it should be carefully preserved in the Registry, as well as other documents relating to the matter, which were not of an official character, ready to be produced at any time when the Court might require them. An intimation from the Court will, therefore, give us access to the documents.

R. Phillimore, Dr., on the same side.—The undisputed facts are these: first, that there are in the Registry of the Vicar-General certain documents relating to this cause; secondly, that we are denied access to them; thirdly, that they would be given up if the Court would make an order or a request to that effect. As to whether they are official or not, that is not for the Registrar to decide. This appli-

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Farnall & Craig.

quest" to the Vicar-General of the Archbishop, to produce a letter containing the primary accusation of the promoter, sent to the bishop, but which formed no part of the proceedings before the Commission of Inquiry, — refused, on the grounds, that this Court had no control over the Vicar-General; that an article in the defensive Allegation, pleading the letter, had been rejected by the Court, as not relating to the cause, and that the present application was made after publication.

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 —
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cation is fully in accordance with the spirit of the old practice, in issuing a Commission of Scrutiny. Oughton, *Ordo Judic.**

Haggard, Dr., for the Promoter.—This application has been, on principle, disposed of twice already. The Court rejected the Article pleading the letter; the letter was referred to in one of the interrogatories, and the Examiner was required to apply to the Registrar to obtain the letter, and if necessary to the Dean of the Arches *in camerâ*. [PRE CURIAM.—The reference made to me was this: in consequence of the interrogatory so addressed to the witness, the Registrar waited upon me, and produced a copy of the depositions and answers of the witness, and I examined them to see if he had fully answered the interrogatory, and I was of opinion that he had done so; but no application was made to me *in camerâ* for the production of any documents.] No precedent has been cited, but it is said that the application is within the spirit of the old practice of these Courts. But it has not been shewn that the document is essential to justice in this cause. Until it be shewn that it has an intimate connection with this cause, the Court cannot comply with the application, which would be doing indirectly what it has refused to do directly.

Jenner, Dr., on the same side.—This is a most extraordinary application. A Monition for the production even of testamentary papers is not decreed without an affidavit. The papers may be used for an ulterior object, and in an interrogatory put to one of the witnesses, she is warned of a prosecution for perjury and conspiracy.

JUDGMENT.

SIR H. JENNER FUST.—This is a motion of a very unusual nature, and I was somewhat surprised at it, having some recollection of what passed on another occasion, and that recollection is confirmed by what was mentioned by Dr. Haggard, as to the article in the Allegation in which the letter was directly referred to. That passed in the usual proceedings in the Court. The letter was pleaded and re-

* *De Instrumentis Exhibendis*, titt. 106, 108, 109.

ferred to as in the Registry of the Vicar-General, and the Court was asked to admit the Allegation, and the Court rejected that article of the Allegation. This being so, I must say that the application at the present moment comes before the Court very unfavourably, for it is after publication in the cause, when all the evidence has been seen, and the Proctor for the party accused has asserted an exceptive Allegation; in this stage the Court is asked to direct an application to be made to the Vicar-General (over whom it has no control) for documents alleged to be in his possession, and said to refer to the proceedings in the cause. I am told that the letter may have some reference to this cause, but it may be required for ulterior proceedings, and have no reference whatever to the charge now under investigation, but to other charges which the Promoter may have made to the Bishop on which proceedings have not been taken; and now an application is made, after publication in the cause, for these documents, to assist in the defence of the party against charges concocted by the Promoter. To what charges this refers I know not; I presume to charges not under investigation. What has this Court to do with that letter? It has nothing to do with this proceeding, except that it may benefit the party in an ulterior proceeding, when possibly he may have power to procure the letter from the Vicar-General by the process of a Court of criminal jurisdiction. But this Court has no jurisdiction over the Vicar-General. This motion is not according to the old practice in Commissions of Scrutiny, but it is a mere application to induce the Court to apply to the Vicar-General to suffer the party to have reference to the paper. Dr. Jenner was referred to the Statute, and the Statute has a material bearing on the question. It directs the mode in which the party accused shall be furnished with the means of defence, and provides that he may have copies of the depositions of the witnesses and of the report of the Commissioners of inquiry. This being so, the party is entitled to be furnished with every thing which passed on that Commission; but there is not a syllable said in the Statute as to his being furnished with the original information given to the Bishop.

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The Archbishop's Registry is not to furnish any documents unless they formed part of the proceedings before the Commissioners. What is this Court to do? It is to investigate a particular charge, and the defence to that charge is that it has been trumped up and concocted by the Promoter, and to prove that fact, they say that there were other charges made against the party which were not proceeded on. Suppose an application were made to the Archbishop, and refused, are there to be any further proceedings? Is there to be a Monition, and is the Archbishop to be pronounced in contempt, and his contempt signified? It is quite out of the course of our proceedings. This Court has nothing to do with the primary proceedings before the Commission. Why was not the letter applied for before publication? Indirectly it was, and the application was rejected, and after publication the Court is asked to do what it refused in the proper stage. I am clearly of opinion that the Court has no power to comply with this application. Perhaps the document may be of importance in another charge: if so, there may be means of obtaining it by the process of the Court which entertains the criminal suit.

In Oughton, under the title "*De Instrumentis Exhibendis*," there is this note:* "*Ista tamen, ante conclusionem in causâ, allegari et peti debent.*" But I put my decision upon these two grounds: first, that the letter was pleaded, and rejected by the Court, as not having any reference to the present proceeding; second, that the application is made after publication in the cause to procure evidence in support of an article of the defensive Allegation which the Court rejected; and why the Court is to do after publication what it refused to do before, I cannot see. I am of opinion that there is no sufficient reason for the Court to depart from its practice and comply with an application so unusual. I, therefore, reject the motion, and the cause must proceed in the usual course. If it had been alleged that the letter had formed part of the proceedings before the Commissioners, the Court might have endeavoured to assist the party; but

Motion re-
 jected.

* Tit. 107, note (a).

even then I do not know that this Court could have entertained the application, for the Act does not give power to enforce the furnishing of information.

Proctors:—Jeffer, for the Promoter; Bowdler, for the party cited.

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Farnall v. Craig.

Consistory Court of London.

JANUARY 22.

Ext. Court Day.

LADY WALLSCOURT v. LORD WALLSCOURT.—*Allegation.*—This was a suit for a divorce, commenced by Lady Wallscourt against Lord Wallscourt, her husband, by reason of his cruelty and adultery. The Libel, which had been admitted after reformation (12th February, 1846), pleaded as follows:—

1—4. The marriage of the parties, then resident at Naples, on the 22nd September, 1826, Lord Wallscourt being a bachelor, aged 26, and Lady Wallscourt (then Miss Lock) a spinster and a minor, the marriage being solemnized at the house of the British minister at Naples, their cohabitation and the birth of five children (of whom two daughters and a son survive) in Ireland and England, as well as on the Continent, until the 19th June, 1845, when Lady Wallscourt quitted her husband's house. 5. That from the first years of their marriage to their final separation Lord W. conducted himself towards Lady W. with violence and cruelty, as hereafter pleaded. 6. That in December, 1826, at Ardfry, in Ireland, the seat of Lord W. (Lady W. being within two months of her confinement), Lord W., one evening, after tea, without any apparent cause, suddenly started from his seat, and seized Lady W. by a handkerchief which was tied round her throat, dragging and pulling, and was only restrained from further violence by the interference of a friend then present; that, in consequence of the fright and injury suffered by Lady W. on the occasion, she was threatened with a miscarriage, and the birth of her child occurred a month before its time. 6. That, on another occasion, in the winter of 1829, at Armagh, in Ireland, Lord W., during the night,

In an Allegation by the husband, responsive to the Libel of the wife, suing for a divorce on the ground of cruelty and adultery, a habit of provocation on the part of the wife, by treating her husband with contempt, by infringing the rules prescribed by him for the management of his family, and by exaggerating facts, may be pleaded as a defence to, and explanation of, her charges of cruelty.

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without any cause whatsoever, struck Lady W., and threatened to knock out her brains, and otherwise conducted himself with such violence towards Lady W. in the course of the night as to compel her to quit her bed-room for fear of her life, and when, after remaining for some time on the staircase, in her night-dress, she would have returned to her bed-room, she found the door locked against her, and was therefore at last compelled to take refuge in a bed-room occupied by two of their female servants, and informed them of what had taken place. 7. That whilst the parties were at Naples, in 1835, Lord W., one day, without any cause whatever, flew into a violent passion with his wife, and seizing a glass tumbler, threw it at her with such violence that it was dashed to pieces against the wall; that he then took up a water-jug to throw at her, and was only prevented from so doing by the interposition of Mary Dawson, one of the servants, and that the water-jug was broken in the struggle. 8. That, in the winter of 1835, whilst the parties were at Naples, sleeping in different apartments, Lady W. occupying the back drawing-room, the folding-doors whereof she had locked, she was awoken by Lord W. forcing the lock and bolts that fastened the folding-doors; that he then immediately proceeded to kick and bruise her on account of the doors having been locked, and otherwise became so violent in his conduct towards her, that Lady W., in fear of her life, was forced to leave her bed-room with nothing on her but her night-dress, and betake herself for shelter to the apartments of her father and mother, residing in the same house, and where, through fear, she was compelled to remain during the rest of the night, and then informed them of what had taken place. 9. That on the 6th November, 1837, whilst the parties were residing at Princes Street, Edinburgh, Lord W., without any just cause or provocation, suddenly seized his wife by the throat, and nearly strangled her; that, in resisting this attack, her neck was severely bruised and her wrist sprained, and she sustained other injuries, and that this occurred in the presence of their eldest daughter, then ill in bed, and in a very excitable state. 10. Rejected. 11. That Lord W., well knowing his wife's affection for her children, in order to wound and harass her feelings as a mother, and thereby, if possible, to drive her from her home, prevented her altogether from interfering in or superintending their management and education; that he frequently, for such purpose, locked the children up for hours together in different rooms in his house at Ardfry, more particularly in a room called the North Castle, situate at one end of the house, and used as a school-room, and the keys of which

one, when he went out, he took with him, to prevent her from getting access to them in his absence; also that, expressly in order to distress and annoy Lady W., he compelled their daughters to make their beds, empty their slops, and clean out their bed-rooms, and sometimes other rooms in the house, as those of the nurse, and his own bed-room; also, for the same purpose, making them wait on him, and even upon their maid-servants, carrying their breakfasts, and otherwise attending upon them, and that occasionally he went so far as to make them wash the plates and dishes in the scullery, and put them away; that he also frequently, to distress his wife, beat especially his eldest daughter in her presence, and boasted on many occasions of ill-treating her children morally, it being, as he said, the readiest and most effectual means of "punishing" their mother, as he expressed it. 12. That whilst at Nice, on their way to Florence, at the end of 1839 or beginning of 1840, Lord W., for the purpose aforesaid, beat his eldest daughter about the face until it became swollen, and the blood flowed, and that when Lady W. was so much affected thereby as to fall into violent hysterics, Lord W. quitted the room without offering or ordering her the slightest assistance. 13. Rejected. 14. That, upon many occasions, after Lord W. had assaulted or ill-treated his wife, he compelled her, either by blows or by threats, to write on paper some statement to the effect that she had been the party to blame on the occasion. 14 a. That whilst at breakfast, in May, 1843, Lord W. having, without any provocation whatever, thrown the contents of a jug of hot milk in his wife's face, and whereupon she had flown into the drawing-room, much hurt and well as terrified, Lord W. followed her there, and then, in her presence and that of their daughters and a maid-servant, whom he ordered into the room, began burning or otherwise destroying her books, some drawings of her father's (upon which she set a great value), and other articles belonging to her, and which work of destruction he persisted in until he made her write out at his dictation a paper to the effect (although contrary to the fact) that she had given, and was sorry to have given, him just cause of offence, and which paper, after reading it aloud to his children and the servant, he pinned up over the mantel-piece, where it remained for several days. 15. That, at the end of June, 1843, Lord W., having and Lady W. in the bed-room of her daughters (who were then away from home, otherwise her so being would have been contrary to his express prohibition), after using harsh and offensive language towards her, buffeted her, and shook her, and dashed her with great violence against the wall, and was at length forced

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to desist from further violence by his butler, who, alarmed by the cries of Lady W., came to her assistance, whereupon Lord W. quitted the room, locking the door, and leaving her locked up therein. 16. Rejected. 17. That, in August, 1844, Lord W., in the presence of his brother, without any provocation whatever, rushed into the room where his wife was, and, coming behind her, seized her by the throat, saying he would knock her down and make an end of it; that his brother, in order to prevent the execution of his threats, threw himself between him and his wife, and at length drew him away, urging Lady W. to leave the room, which she did, and fled into the pantry for protection, whither her husband followed her, but was restrained from further violence by his brother, who continued to hold him forcibly. 18. That, on the 18th September, 1844, Lord W., at Ardfry, expressly in order to distress his wife, had his son, then about three years old, and unwell, taken in an open boat in torrents of rain across an arm or inlet of the sea to a cottage belonging to Lord W., called Prospect Cottage, situated on a promontory opposite Ardfry (and from whence the infant was brought back in the evening), and that, when Lady W. was desirous to be with and attend upon her son, who was taken ill in consequence of such exposure, Lord W., in order effectually to prevent her, ordered her and her maid-servant, about 10 o'clock at night (the weather being stormy), to go to the said cottage, in a small open boat, and where she and her servant were compelled to remain for about a fortnight, with no person whatever to attend upon them, save to bring them their meals from Ardfry. 19. That, in September or October, 1844, Lady W. went to Paris, and resided with her parents there for several months, and on the 31st March, 1845, she returned to Ardfry, where, until the 19th June, when she finally quitted her husband's house, Lord W. still continued his violent and cruel conduct towards her; that she was constantly deprived of the society of her children, who were kept away from her, locked up, and that she was herself often confined by her husband in her rooms, the keys of which he was in the habit of carrying about with him; that on many occasions, during this period, Lord W. came into his wife's room, and without any cause or provocation, began tearing her clothes, and destroying articles of value belonging to her, or kicking her gowns, caps, or bonnets about the floor; that on several occasions he also tore her cap off, and then pulled her hair, struck her in the face, and seized her by the throat, until she screamed with pain; that he also deprived her of her papers and pocket-books, and all the articles belonging to her which he knew that she most valued,

which he ever restored. 20. That in May, 1845, whilst he was at Ardfry, Lord W. went to the door of the room Lady W. was sleeping, and burst it open, and leaving it so, he both the windows, and having pulled off all the bed-room her, flung himself on the bed, and began to throw his legs about in a violent manner; that Lady W., being frightened, made several attempts to escape, but was prevented by her husband from so doing, and also from putting on her clothing; that, after some time, about 6 o'clock in the evening, Lady W. contrived to escape from the room, undressed (save as to her night-clothes), and without shoes and stockings, and ran down stairs, whereupon Lord W. followed her with a stick in his hand, with which he threatened to strike Lady W., in order to escape from his violence, rushed into the housemaid's room down stairs, and having bolted the door, she informed the servants in the room of what had happened; that Lady W., from fear of sustaining further injury from his violence, remained without food until about 11 o'clock the next day. 22. That about 6 o'clock in the morning of the 21st of May, 1845, Lord W. came into his wife's bed-room at Ardfry, and sat in bed there, seized her by the throat so as nearly to choke her, and with such violence that the marks were visible on her person for several days after; that on Lady W. screaming and crying out in pain and terror, Lord W. loosed his hold of her, and went out of the room, but locking the door after him, so that no person could have any communication with her until about 2 o'clock the next afternoon; whereupon, she determined to quit her husband's house, and did so on the following day, and joined her father at Paris, with whom she has ever since resided, apart from him. 23. That some time in 1825, Lord W. contracted a venereal disease by an adulterous connection with a woman, and applied to Sir C. H., M.D., for the cure thereof, to whom he admitted the cause, and being so infected, he communicated the disease to his wife, who was attended for the same by a physician, and under which disease she was a sufferer for a very long period. 24 and 25. Plead the commission of adultery by Lord W. in 1831, 1832, and 1833, and solicitation of chastity by Lady W. on a particular day in 1839.

Defence Articles to the Libel were brought in, on the part of Lady Wallscourt, pleading as follows:—

That on a Sunday morning in the summer of 1843, whilst she was at Ardfry, Lord W., without any provocation

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whatever, locked Lady W. (as he afterwards admitted) in her bed-room, and obliged her to remain without breakfast or refreshment for some hours, when she was, unknown to Lord W., liberated therefrom by Margaret Joe, a domestic servant; upon which Lady W., being apprehensive of further violence from Lord W., betook herself for shelter to a wood near Ardfry; that, on the next morning, after Lord W. had ascertained that his wife had been released from her bed-room by Margaret Joe, he requested the latter to follow him into his drawing-room, where they found Lady W. seated at the piano; that Lord W. thereupon began in a passionate manner to accuse his wife of attempting to poison his children, and at the same time placed his clenched fists against Lady W.'s chest, and pressed her hard against the piano, and when she attempted to expostulate with him, he, in an angry and passionate manner, peremptorily bade her hold her tongue, and declared that unless she did so he would close her mouth and stop her breath, and that he thereupon laid one hand over her mouth whilst with the other he beat her on the neck and throat, which were thereby discoloured; that Margaret Joe attempting to interfere and prevent further violence to Lady W., Lord W. began abusing her, and as she was leaving the drawing-room, followed her, and forbade her in any way again to assist Lady W.; and about the same time, in order further to harass and annoy his wife, Lord W. deprived her of the attendance of her own maid-servant, excepting only for a short time in the morning, and gave directions that no servant in the house should attend her after 9 o'clock in the evening. 2. Rejected. 3. That (with reference to the 11th article of the Libel) Lord W., in 1843, in order to prevent Lady W. having free access to her children, sent them to Prospect Cottage (mentioned in the 18th article of the Libel), and upon an occasion when Lady W., accompanied by Lord W., had gone to the cottage in order to see her children, he, upon the nurse declaring that it was time the infant (his son) was put to bed, immediately, and without the slightest provocation, ordered Lady W. to leave the cottage, and took her violently by the shoulders and expelled her therefrom, and that, upon another occasion, about the same time, Lady W., accompanied by her husband, had gone to the cottage to see her children, and her shoes being wet, she had taken them off, and sent them up to the steward's house to be dried, when suddenly, and without provocation, Lord W., in a passionate manner, directed her, just as she was (without shoes), to leave the cottage, and Lady W. was compelled to remain outside the cottage for some considerable time in the wet, without either shawl or shoes,

and until some were procured from the steward's house. 4. That an adulterous connection pleaded in the 24th article of the Libel commenced about the year 1829, as Lord W. had himself admitted in an affidavit made by him on the 8th April, 1846, and led in the Court of Chancery in a suit there pending between the parties, and also to Dr. Heathcote and others.

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These Articles were admitted. On the 27th November, June 19. 346, the cause was alleged to be under treaty, and on the 15th December it was alleged that the treaty was at an end.

A Responsive Allegation was now offered on behalf of Lord Wallacourt, which pleaded as follows:—

1. That Lady W. is the only daughter, and since 1832 the only surviving child, of Mr. Lock, a gentleman of considerable fortune. 2. Counterpleads the 5th article of the Libel, and alleges that, soon after their marriage, Lady W. began to treat, and became in the habit of openly treating, Lord W. with contempt, consciously disregarded and thwarted him in his views and wishes, and complained, though without any reason, of what was done or provided at Prospect Cottage or at Ardfry, both with respect to furniture and meals, and that she was in the habit of breaking or interfering with the rules and regulations made by Lord W. for the management of his domestic establishment, and especially at a later period with respect to their children, and gave much trouble to his servants, who often complained thereof; that she was also in the habit of greatly exaggerating facts, and making statements in the presence of her children which she and they knew to be contrary to truth; that, in consequence of such annoying and unreasonable conduct, disputes or quarrels frequently happened between them, and Lady W. would, on being remonstrated with, become very passionate and leave the room, and falsely represent to the said-servants and others that Lord W. had ill-treated or insulted her; that Lord W. never did treat her with cruelty or use any violence towards her beyond holding her by the arms, or otherwise straining her, when she became in a passion; that she has frequently on such occasions used angry and insulting language towards him, calling him names and abusing him, and sometimes bit and scratched and kicked him, and endeavoured further to aggravate and provoke him; that after such disputes or quarrels were over, they were mutually overlooked and forgotten, and Lord W. generally treated his wife with consideration and affection. That, after such quarrels had occurred between them, Lady W.

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frequently acknowledged voluntarily that she had been to blame; that, during their absence from each other, they corresponded in the most affectionate terms, and Lady W., in such letters, acknowledged that she had been to blame and had given cause of provocation to her husband, and promised to avoid giving such provocation to him for the future. 4. That, after the birth of their two daughters, in 1827 and 1829, Lady W. was in the habit of passing many months in each year with her parents at Paris and elsewhere on the Continent, whilst Lord W. resided with his children at Ardfry. 5. That, in consequence of such absence of Lady W. from her husband and children, the management and education of the children necessarily devolved upon him, and as well when she came to Ardfry, as when Lord W. with his children joined her at her parents' residence at Paris or elsewhere on the Continent, Lady W. continually broke in upon and interfered with the rules and regulations which had been laid down by Lord W. for his daughters in respect to their studies, dress, and general conduct, and encouraged them in disobedience to or neglect of such rules; that she also frequently disturbed the infant boy and its nurse during its sleep or repast, and acted both with respect to its food, clothing, and being out in the air, in a manner contrary to Lord W.'s expressed wish and desire; that such her conduct in respect of her daughters and infant often led to disputes and disagreements between them, and in consequence of such conduct, and to prevent Lady W. disturbing and interrupting her daughters whilst engaged in their studies in the room called the North Castle, at Ardfry, and not in order to wound and harass Lady W.'s feelings as a mother, as falsely pleaded in the 11th article of the Libel, he often locked the door of the room (which was a large and convenient and well-furnished room, and used as a school-room) during the hours of his daughters' study therein; that Lady W., notwithstanding, continually endeavoured to get access to her daughters during their hours of study, and to hold communion with them by various means, as by letters and sending messages, or passing pieces of music under the door, or making signs by the windows from out of doors, and Lord W., in consequence, ordered the lower shutters of the windows of the room to be closed. 6. That Lord W., who was extremely fond of and affectionate towards his daughters, and allowed them every indulgence out of the hours of study, with a view to teach them to be useful to themselves and independent of others, and not for the purpose of annoying his wife, as pleaded in the 11th article of the Libel, desired them to learn to make their own beds, and arrange and make

tidy their rooms, and perform other offices not unbecoming their age and situation, which they willingly and cheerfully performed; that they made breakfast and tea for their parents, and when at table with them fetched or assisted them with what was wanted, to prevent the necessity of the attendance of servants, and frequently carried breakfasts to their infant brother, his nurse, and the lady's maid, who were accustomed to breakfast in an adjoining room, but no otherwise waited upon their servants; and at times his daughters (greatly to their own amusement) assisting in washing up and putting by the breakfast things, in a room near that in which they breakfasted, which was used as a pantry. 7. That (in contradiction of what is pleaded in the 17th article of the Libel) in a morning in August, 1844, Lord W., meeting his wife in the corridor leading to the breakfast-room, where his brother then was, remonstrated with her for having previously made a statement which she knew to be false in the presence of her children, whereupon, she having treated him in an insulting and contemptuous manner, he did, on her becoming violent, lay hold of her by the arms, when she flew into a towering passion, and bit and scratched his hand so as to make the blood come; that Lord W. called out to his brother, who immediately came, and finding them struggling together, took hold of Lord W., and requested Lady W. to go away; that Lord W. immediately loosed her, and remained quite passive; that Lady W., who was still in a great passion, and apparently inclined to continue the quarrel, did not retire till desired a second time, when she walked away towards the pantry, whither Lord W. did not follow her, but went with his brother into the breakfast-room. 8. That (in contradiction of the 18th article of the Libel) at the time when Lord W. sent his son to Prospect Cottage (18th September, 1844), and when he returned therefrom, it did not rain in torrents, nor was he taken ill in consequence of being exposed to the weather, nor was the weather stormy when Lady W. went to the cottage at night; that the cottage is a pleasant summer residence, and that Lady W. was not compelled to remain there, for the cottage is accessible from Ardfry by a road, and that in the said month of September, Lady W. was constantly over at Ardfry, dining there and seeing her children. 9. That (in reference to what is pleaded in the 22nd article of the Libel), in the spring or summer of 1845, it had been proposed that Lord and Lady W. and all their children should go on an excursion to Tralee and Killarney, and pursuant to arrangements, their youngest daughter had set out on the 17th of June with her uncle, and Lord and Lady W. and their two other children were to follow the

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next morning.* 10. That, notwithstanding, Lady W., early in the morning of the 18th June, declined going to Tralee, and expressed her wish to go to Paris instead; that much angry discussion took place between them, and she becoming very passionate and violent, he laid hold of her by the upper part of her dressing-gown, and by her struggling to disengage herself, the strings chafed her neck, and left marks thereon, as she had herself admitted. 11. That the quarrel was in the course of the day made up, and it was agreed that Lady W. should, next day, the 19th June, go to Paris, on a visit to her parents, for a month, and it was arranged that she should go with Lord W. as far as Oranmore. 12. That, on the morning of the 19th, Lord W. drove Lady W. in his carriage to Oranmore, and the mail not having arrived, he, at her request, drove her on towards Dublin, till they were overtaken by the mail, in which she took her place, and it was at that time agreed and understood by them that she should return to Ardfry after a month's visit to her parents at Paris; that after she had so left Ardfry, Lord and Lady W. corresponded with each other in the same terms and manner as they had been accustomed to do in former absences, until the middle of July following. 13. That during the time when Lady W. was last at Ardfry, from March till June, 1845, although they had separate bed-rooms, the one generally adjoining to or communicating with the other, yet they often slept together in the same bed, and did so on the nights of the 17th and 18th June, 1845. 14. Exhibits, in supply of proof, copies of fifteen letters from Lady W. to her husband and daughters, the originals being exhibited in certain proceedings in Chancery. 15. Counterpleads the 24th article of the Libel and 4th additional article. 16. Counterpleads the 1st additional article, and pleads that Lady W. frequently required the attendance of her servants of a morning so as to interfere with their breakfast hour; that she was also in the habit of sitting up late at night, and keeping the servants up, who complained thereof, and Lord W., in consequence, desired that the servants should not attend upon her during their breakfast hour, nor after the time of retiring to rest, about 10 o'clock at night. 17. That (in reference to the 3rd additional article) on one occasion, in 1845, Lady W. having accompanied Lord W. to Prospect Cottage to see his child, then staying there, the nurse observed that it should be put to bed, whereupon Lord W. expressed his desire that they should leave the cottage; that Lady W. demurred thereto, and he thereupon insisted that she should go, and she then complied; and

* These were the contents of the article after reformation.

it denies that he took her violently by the shoulders and expelled her, and denies that on another occasion he directed Lady W., then without shoes, to leave the cottage, and that she was compelled to remain outside in the wet without a shawl or shoes.

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The admission of this Allegation was opposed.

Addams, Dr., against the Allegation.—I cannot say that this Allegation is altogether inadmissible; but if admitted at all it must be extensively reformed. It is no answer to the case of Lady Wallscourt unless it sets up a condonation, the parties having passed the night of the 18th June together. But I object to the 2nd article, pleading the habit of Lady Wallscourt of treating her husband with contempt, of disregarding his views and wishes, of interfering with his rules and regulations for the management of his family, and of exaggerating facts, &c. [PER CURIAM.—According to the practice of these Courts, habit may be pleaded, though I am aware of the inconvenience of such a mode of pleading, and that it opens a door to a plea on the other side after publication.] The alleged motives of Lord Wallscourt, in respect to the rules and regulations he laid down for the management of his family, have no bearing on the charge of cruelty. Other articles of the Allegation are irrelevant or insufficient.

Bayford, Dr., on the same side.

Sir John Dodson, Q.A., and *Jenner, Dr.*, in support of the Allegation.

DR. LUSHINGTON.—The question I have to determine is, as to the admissibility of certain parts of this Allegation, for it is not denied by the Counsel for Lady Wallscourt, that part of the Allegation is entitled to be admitted to proof.

This suit has been brought by Lady Wallscourt after the expiration of nearly twenty-five years from the date of the marriage, and after the birth of several children, and Lord Wallscourt is charged with adultery, and with the perpetration of cruelty against his wife. In the Libel given in by her, it is alleged, in the 5th article, that almost from the commencement of their cohabitation, Lord Wallscourt was accustomed to treat his wife with violence and cruelty, and

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this Responsive Allegation pleads that she was in the habit of giving her husband very great provocation, and that she was guilty of cruelty towards him. With respect to the merits of the case, the Court cannot form the slightest notion. Nothing could be more contrary to justice and the claims of legal right than the taking an impression, in this stage of the proceedings, of the ultimate merits of the case; nor presuming with respect to any individual facts, whether they might be proved or explained. The only course to be pursued is that which I pointed out on a former day, to see what the law allows to be alleged by way of charge and by way of explanation or denial. On the present occasion, when so many and such grave charges are made against the husband, it cannot be denied that a latitude of defence ought to be allowed to him, considering that the husband is the party upon whom the whole expense will fall. But there is another reason why a latitude of defence should be allowed in a case of cruelty. Where the charges relate to simple acts of severity, they may be met by a plea of great provocation; but where the gist of the charge is *quo animo* the conduct was pursued, then it becomes necessary to examine with great minuteness, not only the facts themselves, but, in the case of severity shown by a father towards a child in the presence of its mother, which is not necessarily cruelty towards the mother, though, under some circumstances, it may amount to cruelty, whether it was an intentional act of cruelty or not, for a father might be guilty of the greatest cruelty towards his child individually, and yet it might not be possible to allege that it was cruelty towards the mother; whereas, on the other hand, a father might be guilty of a less degree of cruelty to his child, with the intention of inflicting cruelty upon the mother.

Practice of
 pleading general
 habit.

In looking at this Allegation, I have observed already that, in this, as in other similar cases, there is a very considerable difficulty in the mode of pleading. For instance, if you plead generally a man to be in the habit of treating his wife cruelly, or, on the other hand, he charges a habit of provocation, it always will be said, How can you prove this, when no time or place is pleaded? If it is not

pleaded generally, you are debarred from shewing from the habit of the party the *animus* of the specific acts. I have always understood the distinction to be this: If you plead ~~generally~~, and allege a habit on the part of the husband or the wife, ~~if~~ you plead it to be a habit, you are not required to plead specifically time or place; but you subject yourself to this, not to a contradiction in plea; but the other party, after cross-examining the witnesses, if any thing comes out, might plead ~~after~~ publication. I do not take upon myself to ~~beard~~ a rule which has been so long in existence, though I am aware of the inconvenience which sometimes results from it, and how desirable it is, if possible, to confine the charges to time and place, and to take issue upon particular and specific charges.

The only other observation I make is this: it is no objection to a plea that it does not answer the whole of the charges. It is competent to a party charged to say, "Half of your charges I reject—*deficit probatio*—and I do not give myself the trouble to counterplead it." The real question in this case is, whether, so far as it goes, the plea is pertinent to the issue in the cause, and gives an explanation of the facts pleaded on the other side.

I now proceed to consider the objections to the different articles.

The first article is admissible. The second is that part of the Allegation on which the real gist of the Argument mainly depended. I have adverted to the principles which must govern the Court in respect to this part of the plea, and I must admit this article, and *à fortiori* after what is not denied, namely, that evidence has been taken upon the 5th article of the Libel, which was divided and separated from the next article, that the Examiner might not be misled. Although the pleadings may be prolonged, and there may be great accumulation of evidence, I am not at liberty to reject the 2d article, pleading the constant habit of Lady Wallacourt to ill-treat her husband, and shew contempt towards him; and infringe the rules and regulations he had laid down for the management of his family. If a wife violates the rules and regulations of her husband (provided

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they are not absolutely absurd or irrational) he has a right to complain of it.

The 3rd, 4th, and 5th articles are admissible. With respect to the 6th article, I give no opinion as to whether the rules and regulations were right or wrong, or consistent with the station and rank of the ladies; but the facts being pleaded, the counterplea is, that it was not done to harm Lady Wallscourt, but for the benefit of the young ladies. I shall have hereafter to try two questions, first, whether it is an act of cruelty at all; and secondly, whether it was for the better education of the young ladies, and not for the purpose of annoying Lady Wallscourt.

The 7th and 8th articles are not objected to. With regard to the 9th, when I first read the Allegation, I had for a considerable time a difficulty to understand the meaning of all this minute pleading; but I now understand that the object is to make out a condonation, for it is not pleaded as a condonation in express terms. I am of opinion that the facts are pleaded with too much minuteness, and I now request Counsel to condense it.

Allegation so
reformed and
admitted.

The other articles have not been objected to in any important particular, and the Allegation, after being reformed as I have directed, may be admitted.

Proctors:—*Rothery*, for Lady Wallscourt; *W. Townsend*, for Lady Wallscourt.

Consistory Court of Bristol.

FEBRUARY 6.

Suit for a divorce by reason of adultery by the husband against the wife, met on

JONES v. JONES.—*Case.*—This was a suit for a divorce by reason of adultery by the husband against the wife, which was met on the part of the latter by charges of adultery and cruelty, upon which she founded a prayer for a

divorce. The facts of the case are fully detailed in the judgment of the learned Chancellor. FEB. 6.

Jones v. Jones.

Dr. PAUL LAMORE.—This was originally a suit instituted by Edward Jones against Elizabeth Jones, his wife, for a divorce by reason of her adultery. The Citation was served the 12th of July, 1846, and the Libel of the husband, when brought in, consisted of seventeen articles. It pleaded the marriage of the parties in the parish church of St. Mary Magdalen, Taunton, on the 10th of February, 1829, the birth of eight children, of whom four were stated to be alive at the commencement of this suit; that, in 1830, the husband, being a commercial traveller, was necessarily much absent from home; that he afterwards became a parchment-maker, and then a tobacco-manufacturer; that at the time of the marriage, the parties resided together in Corporation Road, and afterwards, since 1840, in College Green, Bristol; that, in 1841, Danvers Hill Ward came to lodge with them, and continued to occupy apartments in their house up to the end of 1844; and that, during the whole of that time, Elizabeth Jones carried on an adulterous intercourse with the said Danvers Hill Ward. The plea particularises a variety of instances, and also alleges that, during the years 1843 and 1844, and more especially in the November of the latter year, Mrs. Jones, during the absence of her husband, was visited by divers strange men, who committed adultery with her; that in the summer of 1843, she committed adultery with a person who visited her by appointment; that she raised monies by application to parties by letters, and repaid such monies by the prostitution of her person; that in July or August, of 1843, she went with a strange man to a house of ill-fame in Church Lane; that in 1844, she committed adultery with a person of the name of Lansdour, who had come to the house on business, and took indecent liberties with a person named Winn; that she went to Winn's house in a state of intoxication; that she was subsequently taken to Dr. Fox's Lunatic Asylum; that it was during the time she was at

her part by a cross-suit for a divorce by reason of the husband's cruelty and adultery. The former suit sustained; the latter dismissed. — Conduct of the Proctor for the husband, in serving the Citation upon the wife, and in communicating with her, and, having produced himself as a witness for his client, declining to be cross-examined, on the plea of professional confidence.

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that Aylum, that her husband instituted inquiries which first
 led him to his knowledge of her adultery. In answer to this Libel, on the part of the husband, a
 Responsive Allegation was brought in by Mrs. Jones, con-
 sisting of forty-eight articles. After admitting the marriage,
 she pleaded that, soon afterwards, her husband treated her
 with great cruelty and barbarity, and had continued to do
 so during the whole time of their matrimonial intercourse;
 that, in 1832, she committed adultery with a prostitute, and
 thereby contracted the venereal disease, and was attended
 by Dr. Wallis, that she confessed the fact to his wife, who
 pardoned him on his promise of amendment, but in 1835, he
 again was guilty of similar misconduct, and she again for-
 gave him; that, on 18th of 1840, Danvers Hill Ward
 became their lodger; that he was a middle-aged gentleman
 of high respectability; that he boarded with them, and that
 great intimacy resulted between him, her husband, and her-
 self; but she denied that she had ever carried on an adulterous
 intercourse with Mr. Ward; that she had, with the knowledge
 and sanction of her husband, attended on him in his illness;
 that Mr. Ward had often been present when Mr. Jones quar-
 relled with her, and vainly endeavoured to prevent his in-
 lecent and brutality; that, in 1843 or 1844, her husband
 commenced a course of indecent liberties with Eliza Smith,
 their maid servant, which ended in an adulterous intercourse
 with her; that, in February, 1844, he was again diseased;
 that, in the latter end of the summer of that year, he, she
 cited the chastity of a woman named Greenland, a cook in
 the family, took indecent liberties with a servant, named
 Moore; frequently struck his wife, and forced her to under-
 take menial and disgusting services. Several other acts of
 cruelty are alleged, which, for reasons which will appear
 in the sequel, I need not detail. The Allegation then
 went on to plead that Mr. Jones, having borrowed monies
 of Mr. Ward, was in the habit of sending his wife to make
 application to parties for money to repay him; and that he
 frequently declared he did not care whether his wife remained
 faithful to him or not. The Allegation then proceeded to

counterplead and deny the visits of strange men, and the other charges. It alleges that, in consequence of the ill-treatment of her husband, the spirits of Mrs. Jones became so depressed, in the end of 1844, that she had recourse to drinking red lavender and stimulants; that these increased her disorder, which was of a mental character, induced by the cruelty of her husband; that in December, 1844, she was removed to Dr. Fox's Lunatic Asylum, was cured and left it in May, 1845; that, a few days before she quitted the hospital, her husband visited her in company with her sister, Adelia Sutton-Smith. She further alleges that, having consulted her friends and relations, she determined, in 1845, to institute legal proceedings against her husband.

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The Reply of the husband to this Allegation consists of nine articles, or rather of eight, one having been expunged; he pleads in this some supplemental acts of adultery,—which he swears had come to his knowledge since he instituted the suit,—committed by his wife with Danvers Hill Ward, with William Webb, a porter in his employ, and also with divers strange men. In this Allegation, the husband denies the charges of cruelty and barbarity and adultery brought against him by his wife.

I have thought it right to go through these pleadings, from which it appears that three issues are raised in the course of the proceedings: first, whether the wife has been guilty of adultery; secondly, whether the husband has been guilty of adultery; and, thirdly, whether he has been guilty of cruelty.

Issues in the cause.

The evidence adduced in support of these several charges is very voluminous, thirty-five witnesses having been examined, thirteen on one side and twenty-two on the other; but, for reasons which will appear, the exigencies of the case will not compel me to pursue all the evidence in detail.

Before entering on the proofs by which the charge of adultery against Mrs. Jones is supported, I must advert to a circumstance which has occurred in the progress of the cause, and which has been to me a source of mortification and regret. Mr. Hartley, who acts as Proctor for the husband, and has superadded the function of advocate to that

Conduct of the husband's Proctor.

Part 6. of Proctor, by arguing his cause, produced himself as a witness in the cause, and was sworn accordingly. After which he resiled from his examination, and declined to give evidence on the Libel. The adverse party claimed the right of administering interrogatories to him. Mr. Hartley opposed this claim, and argued the point before me. This objection I overruled, holding that, according to the usual practice, he had rendered himself liable to be examined. He was examined at great length; in the course of that examination, Mr. Hartley admits that he personally served a Citation on the wife at her mother's house in Taunton, on the 8th of July. In every point of view, this was an unnecessary and improper act. Mr. Hartley ought to have known that the correct mode of serving a Citation in an ecclesiastical suit is by the Apparitor, or his substitute, and not by the Proctor in the cause. What he ought equally well to have known, is that the service of the Citation at Taunton was illegal, for the Court has no jurisdiction there. On the occasion of serving this Citation, Mr. Hartley visits the wife at her mother's house, and in the evening receives a visit from her. He is there for some time, and she afterwards came to Bristol, and while, in consequence of her coming, the Citation was regularly served on her by the Apparitor, on the 12th July. He admits that, subsequently to this service, he visited her again in the month of August, she being a person whom he swears he had never seen before this business began. He admits that he again visited her in a fortnight or three weeks afterwards, such business having called him to Taunton; that he sent her a song set to music, and newspapers from time to time; that, at a later period, he accompanied her to Bath; and when he is interrogated in respect to that visit, he withdraws himself under his professional cloak, and declines to answer. Now I wish not to be mistaken on this point, and I allude to it more on account of the practice of the Court than on account of the individual. Mrs. Hartley is interrogated, whether he did not say to Mrs. Jones that he wanted to have a long chat with her about her affairs; that he did not like to do so in his office, and proposed

His communications with the wife.

going to the *Talbot*; that, when the fly came opposite the *Talbot*, she proposed to go over to Bath, as they should be more quiet; that he said she need not be afraid to trust herself with him; that he did take her by train to Bath; that they took tea together, and that, on her going into a bed-room, ~~she did not read the remainder, as it is negatived.~~ In answer, however, to the first part of this interrogatory, Mr. Hartley says, that his object in going to Bath with the defendant was of a confidential nature, and then he denies the other circumstances connected immediately with the charge of adultery, ~~heretofore shown distinctly.~~ Now it is a singular answer to make, that the object was confidential. What could there possibly be confidential between Mr. Hartley and the person who was opposed to his client? It is a most erroneous notion, and the sooner it is corrected, the better, that a person is entitled to professional protection for any communication, not with his agent, but with a person opposed to his client, and such a nodebated if application had been made to me, for a more positive and distinct answer to the interrogatories, I should have required such to be made. [Mr. Hartley.—But we do suggest, that there is another suit pending in a Court of Common Law.] How does that affect it? [Mr. Hartley.—The word “confidential” had reference to that.] That might do with Mr. Jones, but what had it to do with Mrs. Jones? [Mr. Hartley.—My tongue is tied during the pending of that action.] But you shelter yourself by it from this interrogatory. Various letters also passed from Mr. Hartley to Mrs. Jones, I feel anxious that the practice of this Court should be maintained inviolate. [The learned Chancellor read extracts from several of the letters; when Mr. Hartley said, that, ~~in justice to him,~~ those parts also should be read which would show that they were written during a negotiation which was going on between the defendant and her husband, to effect a separation, without commencing the present suit. He then read letters both from the husband and the defendant; ~~and as regarded the clothes and music, they belonged to the defendant, and it was by direction of her husband he sent them.~~] I am extremely desirous to hear any explanation of what seems to me so extraordinary. Let us pause for

Feb. 6.

Jones v. Jones.

His plea of professional confidence.

FR. 6.
Jonas v. Jonas,

a moment to consider the relative positions in which the parties stood. Here was a woman accused of every great adultery; I have hardly ever known a case more gross. The charges are inspected and approved of by Mr. Hartley, and are drawn up under his sanction. If Mr. Hartley had been familiar with the rules and practices of the Court, he would have known that it was a sacred obligation on him to abstain from all communication with the wife of his client. All Courts regard such communication as very unprofessional. Any communication which the solicitor of one party has with a party opposed to him in the case is extremely unprofessional. In the Ecclesiastical Court, the inducements to collusion and connivance are so strong that, do what we will, collusion and connivance will occur; but the Judges expect to be assisted in their struggle against that collusion and connivance by the correct conduct of those who practise in the Court. It is a matter of the strictest justice to protect a helpless and undefended wife from being entangled in the meshes of a detestable opponent, and this practice pollutes justice at its very source, which ought ever to flow in a clear and unobscured stream.

I have dilated on these facts because I am determined to set my face against such laxty of practice. It takes up time and a pleasure in this Court, and I am anxious to maintain its purity inviolate. I am willing to believe that, in the present instance, the deviation is the result of carelessness or ignorance, and to accept the excuse which Mr. Hartley has offered, that it occurred in his endeavours to effect an amicable separation; but Mrs. Hartley, as a person of experience, must have known that it was the Proctor, as the agent of the wife that he ought to have communicated personally with, and not with the wife herself. If Mr. Hartley, — With the agent I did communicate. There was no Proctor then. But why communicate with the wife? It might have led to extreme injustice, and I declare it has made me look with fear and trembling at the whole evidence; and if I had discovered that that had been affected by this interference with the wife, I would have quashed the whole proceedings. Mr. Hartley, — But what

not been so] : it might have been. Mr. Hartley must have known that the correct course was, not to communicate with this wife.

Exa. G.

Jones v. Jones.

I have deliberated on this point, with respect to the evidence in the cause, from the liability that the evidence against the wife might have been affected by this proceeding, and I have great satisfaction in stating that I do not think justice has been polluted at all. This has weighed very much with me. I think the proceeding unprofessional and improper; but it was not in the nature of things that Mrs. Jones could overcome the case against her. I think the proof of adultery have not been affected by this improper communication, which might have led to very great pollution of evidence, and to treachery against Mrs. Jones. I abstain, therefore, from doing more than monishing Mr. Hartley, and I wish him to consider himself monished to abstain from a similar offence; and I give notice that, in the event of any such intercourse between a Proctor for a party proceeding, and the party proceeded against, again taking place, I will suspend the Proctor guilty of such conduct, be he who he may.

Another circumstance has occurred in the progress of this cause, to which I will briefly advert, before proceeding to investigate the evidence. Fanny Wade was examined on both the pleas given in by the husband. On the Libel, she spoke to some indecent acts as passing between Mrs. Jones and Mr. Ward, and to her belief that such acts resulted in the commission of adultery; but she distinctly denied having witnessed any criminal act. She saw that which she had no doubt led to criminality, but she denied having seen any act that was criminal. On the second plea, she deposes to having been an eye-witness of an act of adultery characterised by circumstances of so extraordinary a nature that it could not have escaped her recollection. Without questioning the good faith of this witness, I think the safest way is to abide by the maxim in law, *stare priori juramento*, and stand on her first deposition; therefore, I hold that there is no direct evidence by Fanny Wade of adultery. I now proceed to the mass of evidence which has been brought forward to substantiate the charges of adultery.

Discrepancy in the testimony of a witness.

Merits of the case.

Exa. B.
0. 14. 1
Jones v. Jones.
1890. v. 1890.

Charles
skinner the
husband

against Mrs. Jones, first, with Mr. Ward to seduce and with
divers strange men; and thirdly, with William Webb to
partake. I deliberately use the expression "A most" of evidence,
because, from its nature and character, I do not intend to go
minutely into the revolting and disgusting details which pre-
sent themselves throughout it. The unfortunate wife who
is the immediate subject of this proceeding, is admitted
by general and common witness to have been addicted to
the use of intoxicating liquors, and was consequently the
quintessence of vice, by these, it is well known, that lascivious
acts and an unusual concomitant of drunkenness, and her
indecent and lascivious language may be imputable to this
vice. It is, however, not necessary to state the facts in detail,
beyond the scope of civil, that she was in the habit of in-
dulging in language of extraordinary obscenity. I have
heard Mrs. Jones use bad and obscene language, such
as no modest woman would utter, in the robust and un-
feminine of a witness who, whatever may have been her faults and
failings in the vices of her mistress, and the companion of
her debaucheries. It is no justification of Mrs. Jones to
say, that it was the being addicted to drunkenness which
caused her to talk so freely; this only makes the act of such
a woman more probable, and in direct contrast with Mrs. Ward
there is abundant proof of all the gross and filthy
gross and intimate acts which lead Ecclesiastical Courts to the
judicial conclusion of the existence of an adulterous inter-
course. In my opinion, that the adultery with Daniel
Hill Ward has been substantiated by the evidence
The fifth article alleges that Mrs. Jones was visited by
divers strange men, who committed adultery with her, both
by day and night. The evidence on this branch of the
libel presents a system of revolting obscenity and filth
when the whole was read of the case are borne in mind.
Mrs. Jones's general conduct, her obscene conversation, &c.
furnishes ample proof in support of this charge, and

The last charge is that of adultery with William Webb
the porter, and one of the witnesses mentions an act of such
disgusting indecency, preceded by a conversation of such
nature as must satisfy every judicial mind that the act of

Charles
skinner the
husband

adultery followed. This charge also I hold to be completely established.

FEB. 6.

Jones v. Jones.

Her adultery, however, has not yet terminated. In the desert which the wife has set up, she does not confine herself to a denial of the fact of her adultery; but institutes a cross edit against her husband; and prays the Court to grant her a divorce on two grounds—the cruelty and adultery of her husband. Many witnesses were examined on the charge of cruelty; but the learned Counsel who so ably conducted the defence, under the pressure of necessity, was obliged to give it up as untenable, and therefore it is not necessary for me to enter upon it. If I were to do so, I must say, unhesitatingly, there is no ill-treatment proved. If it had been proved, it would be no excuse for adultery by the wife, who should have sought her remedy in the purity of her conduct, and the contamination of her person.

Charges
against the
husband.

It depends, therefore, to the other charges made against the husband; for however guilty a wife may be, the law, in administering in these Courts, would bar a guilty husband from any remedy. I have examined the evidence brought to substantiate these charges with all the attention which the interests of truth and justice required. The evidence of the medical witnesses does not prove that Mrs. Jones was infected with the disease; and the charge of positive adultery with Ellen Smith rests on the credit of that single witness, whereas the law, with a very proper jealousy, requires two witnesses to prove adultery; or that the evidence of the single witness should be corroborated beyond all doubt by circumstances. But her evidence in other respects is opposed to that of all the other witnesses; and in regard to the particular transaction to which she swears, she has told a most extraordinary and incredible story. She is moreover a person of abandoned character, who was in the habit of getting drunk with her mistress, assisting her in all her debaucheries; and keeping watch over the door when gentlemen called to see her.

On a review of the whole case, I come to the unhesitating conclusion that the charges of adultery against Mrs. Jones are established. It is equally clear that the charge of

Charges
against the wife
proved; those
against the
husband not
proved.

PER. W.
Jones v. Jones.

Divorce at
suit of the hus-
band.

cruelty brought against the husband has not been proved in any way, and that the charge of adultery against him rests on the evidence of a witness to whom no Court could give credence; and under these circumstances, my task is con-
cluded by pronouncing for the divorce sued for by Mr. Jones, and by dismissing the cross suit.

Prerogative Court of Canterbury.

FEBRUARY 13.

Domicil.—A spinster, born in England, and residing there until the age of 21, proceeds, three years before her death, to Scotland, to reside permanently with her father, who had deserted her seven years before, and settled there; and she continued to reside in Scotland until her death, dying intestate:—Held that administration of her effects must be governed by the law of Scotland.

IN THE GOODS OF ANN GRIFFITH, SPINSTER, dec.—
Motion, ex-parte.—The deceased died intestate 51st August, 1831, leaving W. G., her father, then surviving, but who died in 1840, without having taken administration of the goods of his deceased daughter. She also left a brother, W. H. G., and two sisters, one of them by the half-blood, having been the child of a second marriage of the father. W. G., the father, was a native of England, but in 1831 he went to reside in Aberdeenshire, North Britain, and afterwards at Aberdeen, and continued to reside there until his death. The deceased was also a native of England, but resided with her father at Aberdeen from the year 1833 to the time of her death. By the law of Scotland, she would be held to have died a domiciled Scotchwoman, and the brother and sister by the whole blood would be the only persons entitled to the personal succession of their deceased sister, in preference to and to the exclusion of her father, or of his personal representatives, and her sister by the half-blood; and by that law, the brother or sister of the whole blood can take up such succession by confirming themselves executors dative *qua* nearest of kin to the deceased in Scotland, which in nature and effect is similar to Letters of Administration in England, and neither the father or mother of the deceased, nor the sister of the half-blood, could have

take upon themselves such confirmation, having no interest whatever in the estate and effects of the deceased. The deceased was entitled to one-fourth part of £2,000 Three per Cent. Consols, since October, 1845, which then vested in her, on the death of her mother-in-law, under the will of J. G., proved in May, 1831, respecting which a suit was now depending in the Court of Chancery, which was suspended for want of a legal personal representative of Ann Griffith.

Exa. 18.
Griffith, dec.

Addams, Dr., moved for Letters of Administration of the effects of the deceased to W. H. G., the brother.

Jan. 15.
Motion.

SIR H. JENNER FUST. — The party deceased died in 1831, and I presume she had no other property to be administered besides this. She left a father, who died in 1840. He had gone to reside in Scotland in 1821, and continued to reside there until his death; which is a strong proof that he was a domiciled Scotchman. But the daughter was born in England, and resided here until she was 21, when she went to Scotland, in 1828, and lived there until her death in 1831, under what circumstances is not stated—whether she relinquished her English domicile and acquired a new one. The sole question is, whether her domicile was Scotch or English; for if she was a domiciled Englishwoman, her father was entitled, and he must be represented. It appears also that she left a brother and a sister of the whole blood, and a sister of the half-blood; and, according to the law of Scotland, the whole property would go to the brother and sister of the whole blood, the father and the sister of the half-blood being excluded. I must, therefore, be satisfied that a Scotch domicile was acquired, and the English domicile abandoned; whereas there is nothing before me but that the father went to Scotland in 1821, and died there in 1840, and that the daughter went to Scotland in 1828, and died there in 1831. I must be satisfied that the deceased's domicile was Scotch, and that the property ought to be administered according to the law of Scotland. I must reject the motion.

Rejected.

The motion was renewed upon further affidavits, which

Feb. 13.
Motion re-
newed.

Feb. 13.

Griffith, dec.

stated that, in 1821, the father of the deceased, then a widower, and resident in England, being in distressed circumstances, deserted two of his children, the deceased and a brother named John, and went to Scotland to seek a livelihood, taking his other two children with him; that the deceased, then about thirteen, and her brother John, were afterwards received into the workhouse of St. James, Westminster, as paupers, whence she entered service; that her father, having settled at Aberdeen, and succeeded in life, in 1828, sent for the deceased to reside with him there, and that she accordingly went, intending, as she declared, to take up her permanent residence with her father in Scotland, without any intention of returning to England; a proxy of consent to the grant of administration to the father was executed by the sister of the half blood.

Administration decreed.

The COURT was satisfied with the information contained in these affidavits, and decreed administration as prayed,

Burchett, Proctor.

Practice.—Where a will, exhibiting alterations on the face of it, is attested by three witnesses, all of them must join in the affidavit as to what they know respecting such alterations.

IN THE GOODS OF ELIZABETH TOWNSEND, SPINSTER, DEC.—*Motion, ex-parte*.—The testatrix died 8th December, 1846, leaving a will, all in her own handwriting, dated 3d October, 1844, and attested by three witnesses. The will exhibited certain erasures, alterations, and interlineation, respecting which an affidavit was produced from two of the witnesses, stating their impression that the alterations were made at the time when they attested the will.

PER CURIAM.—In cases of this kind, there should always be an affidavit from all the witnesses, or the absence of an affidavit of a witness should be explained and accounted for. All who were present and attested the will should make an affidavit in such cases. It must be understood that where there are three witnesses to the execution, all must join in the affidavit, stating what they know or do not know.

Feb. 23.

(An affidavit was produced from the third witness, stating that he saw only the side of the will to which he subscribed

ne, and could not speak to the alterations, and the be-
 lieved probate as the paper stood.)

Ex. 14

Townsend, dec.

Proctor.

MR. AND MEREDITH v. TRAPPES.—*Allegation*.—This
 business of proving the will, dated 17th October,
 with a codicil, dated 9th November, 1839, of George

Esq., by Mrs. Anna Maria Payne, the widow, and
 Charles Meredith, the surviving executors named in
 it, against Mrs. Caroline Frederick Legge Trappes
 (of Roger Milton Trappes), a legatee named in a will
 executed, with a codicil thereto, dated respectively
 May, 1837. An Allegation, propounding the will of
 and codicil of 1839, pleaded the *factum* and due exe-
 cution of the instruments; the codicil, written by the testa-
 tor, being to the following effect:

bridge, November 9, 1839. I, George Payne, write this as
 it to my will made by Charles Meredith, Esquire, of No. 8,
 square, Lincoln's Inn, London, dated 12th May, 1837. I
 my sister, Louisa Payne, now living at Halford, in the
 of Middlesex, the sum of twenty pounds a year for her life,
 and half-yearly, by Charles Meredith, Esquire, of Lincoln's
 and I am sure that my wife, Anna Maria Payne, will see
 in my wish will be strictly attended to. George Payne.
 s. William King, Ann King.
 bridge, November 9th, 1839. Signed this day.

Allegation further pleaded that such codicil does not
 ny intention on the part of the testator to revive the
 the 12th May, 1837 (in terms therein referred to),
 the any intention thereby to revive the same; that,
 solely to the will of 1837, his youngest daughter (now
 Trappes, party in the cause) married, and the testator,
 dy (as he declared) in consequence of such marriage,
 and executed the will of October, 1838, thereby
 g the former will; that the will propounded, as well
 of 1837, was made by Mr. Charles Meredith, of New
 Lincoln's Inn (party in the cause), and one part of
 of 1837: (the same having been executed in dupli-

Where a tes-
 tator, having
 executed a will
 in 1837, in du-
 plicate, in 1839
 executes ano-
 ther inconsis-
 tent will, at the
 same time can-
 celling the part
 of the will of
 1837 in the pos-
 session of his
 solicitor (the
 other part be-
 ing in his own
 possession), in
 1839 writes a
 codicil, be-
 queathing a le-
 gacy to his sis-
 ter, describing
 it as "a codicil
 to my will made
 by C. M., of
 &c., dated 12th
 May, 1837;"
 the Court ad-
 mitted an Alle-
 gation pleading
 circumstances
 to shew that
 the will of 1837
 had been re-
 ferred to by
 a mistake of
 the testator, in-
 stead of the
 will of 1838,
 which he had
 no intention to
 revoke; the
 Court holding
 that the will of
 1837 having
 been not merely
 revoked, but
 cancelled, by
 the testator,
 and both wills

Ex. 12

Payne v. Tupper

having been made by C. M., the case was distinguished from prior cases, where parol evidence was excluded.

ARGUMENT.

case) was in the possession of Mr. Meredith, at the office of himself and his partner, Mr. Reeve, from the time of its execution until the will of 1838 was executed, on the 17th October, on which day, after the execution of the testatrix, being then at the office of Messrs. Meredith and Reeve, said testatrix cancelled such one part, by cutting off his signature and seal therefrom, as also from the codicil thereto of seven date (as appeared from the scripts themselves) and (by signing his name under the word "cancelled," and signed on each of the said scripts; that when the testator wrote the codicil of 1839 propounded, the duplicates of the will and codicil of 1837 were in his possession (as was also one part of the will of 1838, which had likewise been executed in duplicate) and that, by error or mistake, he inserted the date of the former in the codicil, instead of that of the will of 1838; that the testator executed such codicil solely for the purpose of bequeathing the annuity therein mentioned to his daughter that day after having executed the codicil propounded he gave the same, closely sealed up, to his said sister, desiring her (and which she did) to keep the same in her possession, and not to open it till after his death.

The admission of this Allegation was opposed. *Jenner, Dr.*, for the legatee under the will of 1837. This is a question as to the admissibility of parol evidence to shew that there was no intention to revoke the former will. By the codicil of 1839, the testator refers, not to the last will of 1838, but to his former will, "made by Charles Meredith, Esquire," and, "dated 12th May, 1837," and in there is no doubt or ambiguity upon the face of the paper, parol evidence is inadmissible. *Walpole v. Chalmers*. Even if such evidence were admissible, it would not establish the case set up on the other side. The reference in the will of 1837 is complete and distinct in all particulars and that will and the codicil were in the testator's possession at the time he wrote the codicil of 1839.

Quincey v. Addams, Dr., for the executors of the will of 1838. On this point, the court is of opinion that the parol evidence is inadmissible. 7:7:7: R. 123. S. C. 3 Ves. 402.

Based on two questions in this case, one of which has to be decided on judicial consideration, not any legal question. The question is distinctly put in issue in the action, which pleads that the codicil of 1889 does not show any intention to revive the will of 1857, and that its object was to bequeath an annuity to Miss Payne. The issue, therefore, is not solely whether parol evidence is admissible to show that there was no intention by that codicil to revive the former will, and that it was only a will made the date of the will; but we distinctly raise the issue whether, in point of law, the codicil does show any intention to revive the former will. All the decisions in this case have been with reference to instruments prior to 1838, except that in *Quincey v. Quincey*, which does not decide this case. I know that, independently of the statute, it has been laid down that the referring in a will by date operated to the republication of that will, and a contrary intention could be inferred from the will itself, which would neutralize such reference. But I am aware it has ever been held that, in all cases, when a codicil referred to a will by date, it thereby republished such will. In *Watpole v. Cholmondeley*, which was a case between a will of 1752 and a will of 1756, Lord Eldon, when about to make a codicil to his will, upon his saying he should want his will, sent him for it to a steward, who gave him the will of 1752, instead of the will of 1756. But in the codicil it was declared to be "a will into his said last will," and was to be taken as a part of it. There was in that case a confirmation of the testator's said will, and not a mere reference to it by date. In *Quincey v. Quincey*, "and in all other respects I hereby said will and codicil." There is nothing of that kind. But whatever opinion might be entertained upon the question prior to the Wills Act, it is totally different now, and the second of that Statute enacts that no will or codicil shall be in any manner revoked, shall be revived, shall be confirmed by re-execution, or by a codicil "showing intention to revive the same;" and if a codicil, *qua* codicil, shows an intention to revive, what is the use

PL. 13

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Ex. 13.

*Payne v.
Treppe.*

of these words? Here the testator was merely referring to his will, and by mistake put in a wrong date, mere words of surplussage, the instrument being sufficient without them. Mr. Jarman,* in commenting upon the case of *Walpole v. Cholmondeley*, cites the remark of Lord Kenyon:—"Supposing Lord Orford had said to the attorney, 'I have two wills in the steward's hands; desire him to send me the last will;' and the steward had by mistake sent him the first, and that mistake had been shewn by parol evidence, that would have been a latent ambiguity; and it seems to me (though the opinion is extra-judicial) that that ambiguity might have been explained by other parol evidence, on the same principle as in the instance of cancelling a will, where parol evidence is admitted to shew *quo animo* the act was done; or as in the case of a child's destroying a deed." There is no case in which a mere reference in a codicil to a will which had been revoked had the effect of reviving the will. The words in the Act, "shewing an intention to revive the same," I think, were introduced for the purpose of preventing the effects of such mistakes on the part of testators; the framer of the Act had probably the case of *Walpole v. Cholmondeley* in his mind. But suppose the Court to be against me upon this point, then there is an ambiguity which will let in parol evidence. Both wills were made by Mr. Meredith, and the testator evidently inserted the date of 1837 through error. One part of the will of 1837 had been not merely revoked, but cancelled. Mr. Meredith is executor in both wills, and no communication was made to him by the testator of his intention to revoke the will of 1838. The 22nd section of the Act has not yet received a judicial interpretation. Mr. Jarman,† speaking of the republication of wills, says:—"Such questions may occur even in regard to wills made since 1837; for though the 22nd section of the recent Statute prevents the revival of a revoked will, except by re-examination, or by a codicil shewing an intention to revive the same, and, therefore, no such effect would follow from the mere revocation

* On Wills, 1 vol. 352 (Ed. 1841). † Ibid., 172

posterior revoking will; yet, probably, it would be held, according to the doctrine in *Lord Orford's case*,¹ recognition in a codicil of the earlier of two inconsistent and undestroyed wills, by date or otherwise, as the one in which the codicil is founded, shews an intention to revive the will." I submit that this Allegation is entitled to proof, 1st. because the codicil does not, on the face of it, shew an intention to revive the former will,—the date being a slip of the pen and entire surplusage; 2nd. because, in the absence of sufficient ambiguity and doubt, without resorting to evidence, to shew that the testator did not intend to revoke the will of 1837, which had been revoked and cancelled.

In *Re Chapman*,* Dr. Lushington decided a similar question upon the authority of *Walpole v. Cholmondeley*,[†] holding that parol evidence could not be received to shew that a reference in a codicil to a will of 1842 was a mistake, and that a will of 1843 was intended.

The question was not raised, in the case of *Walpole v. Cholmondeley*, whether the codicil ought to shew and did shew an intention on the part of the testator to revive the revoked will. There is a difference between republication and revival. Where a will has been revoked and cancelled, there must be something more than a mere reference to it in a codicil in order to revive it.

H. JENNER FUST.—The codicil of 1839 refers to a Judgment of prior date to that propounded in the Allegation, and the question is, whether it shews on the face of it an intention to revive that former will; for, according to the 22nd section of the Wills Act, a will once revoked may be revived by a codicil "shewing an intention to revive the same." This is the first question for the consideration of the Court. Under the Statute of Frauds, in the case of *Walpole v. Cholmondeley*,[†] it was held that a reference to a former will in a codicil, which also contained a confirmation of the said will, revived a will that had been revoked. In the present case, both the wills were not before the testator at the

FEB. 13.

*Payne v.
Trappes.*

*Walpole v.
Cholmondeley.*

* 1 Robt. 1. 3 Notes of Ca. 198.

† 7 T. R. 138.

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 —
Payne v.
Trappea.

time; he sent the solicitor who drew the codicil to his steward, for "his will," and the steward gave him the first will, instead of the last, and the solicitor made the codicil refer to the first will by date, and confirm "my said will." This appeared to shew an intention to revive the former will, and parol evidence was not received. I should have been inclined to hold in this case that the codicil, *primâ facie*, did shew an intention to revive the will of 1837, because, on the face of the paper, there was no other will, and there is a reference to the person by whom the will was made. But it turns out that both wills were made by the same solicitor, and therefore there is merely the reference to the will by the date, "12th May, 1837," from which the Court is to collect the intention. *Primâ facie*, I should be of opinion that this is a codicil to the will of 1837, on the face of the paper; and the question is, whether the Allegation is admissible to shew the circumstances under which the codicil was executed. I agree with the case of *Chapman*,* decided by Dr. Lushington, that a reference in a codicil to a will of ~~per~~ date, revoked by a subsequent will, is a revival of ~~the~~ will,—the will remaining uncanceled and perfect at the time. But here another question is raised by the circumstances stated in the Allegation, namely, that the will itself (one part of it) so referred to had been cancelled by the deceased at the time he executed the codicil. That paper had been revoked and cancelled by the deceased, by cutting off the signature and seal; and the question is, whether that was not a destruction of the former will. There is a distinction, therefore, between this case and that of *Walpole v. Cholmondeley*; namely, that in this case the will is not forthcoming, one part having been destroyed by the deceased; for, as in the case of *Pemberton v. Pemberton*,† if the testator destroyed one part of his will, the inference is that he intended to destroy both: it is a case of presumption, as stated by Lord Erskine in that case, where two parts of a will were found in the possession of the testator at his death, one part altered and cancelled, the other uncanceled and unaltered. Has not the party here a right to shew that, at

Distinction
 in the present
 case.

* 3 Notes of Ca. 198. 1 Robert. 1.

† 13 Ves. 310.

the codicil was executed, the will of 1837 was and destroyed? Must I not have all the circumstances before me? The cancellation was advisedly done; not a mere revocation, but the will itself had been so by cancellation; and, therefore, there is a material distinction between this case and the cases of *Walpole v. Leley* and of *Chapman*, where the papers were all good perfect. I think I am bound to admit the Allegation all these circumstances.

I have some doubt as to that part of it (the 4th article) which leads that, subsequently to the execution of the will of 1837, the testator's youngest daughter married, and thereupon expressly, "as he declared," in consequence of such marriage, made and executed the will of 1838. I think all the circumstances connected with the case are important, but I doubt whether this article does so far, in pleading a declaration by the deceased that the will of 1838 was made in consequence of the marriage of his youngest daughter. There is a material distinction between the will of 1837 and that of 1838, for by the will of 1837, the testator has only a life-interest, whereas by the will of 1838, the whole property is given away from the daughter to the wife, which may be a strong circumstance to shew that it was intended to revive the will of 1837. But I have great doubt whether evidence of the declaration of the deceased, that the will of 1838 was made in consequence of his daughter's marriage, can be received. I shall, therefore, reserve my opinion as to that point till the case comes before the Court terminated upon the merits.

I am of opinion that, at the present moment, the case is not fit for the decision of the important point of law, whether the will of 1837 is revived. I think the Allegation is not to be admitted,—except that part which pleads the testator's declaration, respecting which I reserve my opinion. If the circumstances are material, and relevant, and sufficient to shew *quo animo* the act was done, and I therefore admit the Allegation as it stands.

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Payne v. Trappes.

Allegation admitted.

By *Nicholson*, for the executors; *Abbot*, for the legatee.

Jan. 13.

Payne v.
Treggs.

1846.
April 18.
May 26.

On the 22nd July, 1846, the Court met at 11 o'clock, and the following cases were called on for judgment:—
QUINCEY AND OTHERS v. QUINCEY AND OTHERS.—This was a cause of proving the will of Mr. Burton Brown, dated 14th July, 1837, with a codicil, dated 28th October, 1843, promoted by the executors named in the codicil against the next of kin and a legatee for life substituted in a former will. The deceased died 24th February, 1846; a widower, possessed of personal property under £30,000, leaving six daughters, his only children. On the 29th April, 1833, he made a will, whereby he reserved £2,000 to each of his three unmarried daughters, Elleanor, Louisa, and Emma (having, on the marriage of two other daughters, given to each a similar sum); and divided the residue amongst those five daughters equally; the other daughters having been otherwise provided for. In December, 1835, Elleanor married, when the deceased settled upon her £2,000, and on the 29th January, 1836, made a codicil, revoking the aforesaid legacies bequeathed to her by the will, and on the 14th July, 1837, he executed a new will, whereby he placed his daughter Elleanor the same footing as her married sisters, in respect to their interest in the bulk of his personal property, leaving his three unmarried daughters, Louisa and Emma, provided for as in his former will. This new will was drawn up principally from the will of 1833, which was not forthcoming. The will of 1837 was deposited at the deceased's bankers', where it remained until his death. After the death of the deceased's wife, in September, 1843, the deceased gave instructions to his solicitor to prepare a codicil to his will (stated by him to be at his bankers'), but, unfortunately, the codicil of January, 1836, was handed to the solicitor by the deceased's daughter Louisa in the presence of the deceased, as containing the date of the will, and accordingly, in the codicil prepared by the solicitor, which was executed on the 28th October, 1843, it is stated to be a further codicil to the will of 29th April, 1833, instead of the will of 14th July, 1837; and it confirmed his said will and codicil (by *Adams, Dr.*, moved *ex parte* for probate of the will of 1837 and the codicil of 1843; which motion the Court rejected, and renewed the motion upon a proxy of consent from all the parties interested. *See* *St. H. Jenner Esq.*—This case was moved in the first session of Easter Term last, and at that time it was stated that proxies of consent would be exhibited from all the parties inter-

with the exception of one, and the Court said it could not be shown; there was sufficient to shew that it was a question of considerable importance with reference to the interest of the estate. It now appears that proxies from all the parties were brought in, and it is stated that the parties interested were prevailed upon to consent to probate passing evidence to the words "prevailed upon;" I have great doubt, and I am not at all prepared to say that I can dispose of the case upon a proxy which has been wrung from parties against my opinion as to whether it was the intention of the deceased that the codicil of 1848 should be a codicil to the will of 1837. It is stated that, in April, 1833, the deceased executed a will, which made a provision for his family according to their wants at that time, and in January, 1836, he executed a will altering the will according to the altered state of the circumstances of his family. In July, 1837, he made a new will, as alleged, from the will of 1833, and I have no doubt it was altered according to circumstances. There is no evidence that the will of 1833 was destroyed, except that it is not forthcoming. It seems that the will of 1837 was deposited by the deceased at his bankers'. His wife died in September, 1843, and it was necessary to execute a codicil in order to adapt the disposition of his property to the then existing circumstances. Now the codicil of January, 1836, was given to the person who drew the new codicil, as containing the date of the will which that was to be a codicil. The will mentioned in the will of 1836 was the will of 1833, so that, in consequence of mistake, as it is alleged, the codicil of October, 1843, was made as a further codicil to the will of 1833, instead of the will of 1837. The motion is for probate of the will of 1837 and the codicil of 1843, as a codicil to the will of 1837, whereas it is on the face of it that it is a codicil to the will of 1833. I am prepared, upon an *ex-parte* motion, to accede to such a motion although the parties are willing that probate should not be granted if it is to contradict a written instrument by parol testimony. There may be circumstances so strong—the depositing the will at the bankers', and other circumstances—if they are propounded, as to induce the Court to see that it was the intention of the deceased that the codicil was intended to be a codicil to the will of 1837, and not to the will of 1833; but I could not grant probate of such papers on motion, even with the consent of the parties. If the facts are all proved, there could be no doubt

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that the papers are entitled to probate; but if the Court is not clear, it would not depart from principles; and if any alteration had been made by the new Statute of Wills, it would be still more incumbent upon the Court. I am of opinion that the papers must be propounded; I cannot decree probate of them upon *ex-parte* motion, especially when the proxy of consent has not been given freely and voluntarily, but has been obtained by persuasion, and by the party's being "prevailed upon." I must reject the motion.

The papers were accordingly propounded in an Allegation, which pleaded the facts before stated, and also that, in giving instructions to his solicitor for preparing the codicil of 1843, the deceased stated that he intended it to be a codicil to a will then at his bankers'; that at that time there was no other will of the deceased at his bankers' than the will of 1837; that at the time of receiving the instructions, the solicitor desired to see the will, in order, among other things, to ascertain the correct date, but the deceased objected on account of its being at his bankers'; whereupon his daughter, by the deceased's desire, but through his error, gave the solicitor the codicil of 1836, as containing the desired information, and that the will of 1833 had been destroyed by the deceased's wife, by his desire, before the execution of the codicil of 1843. These facts were all proved or admitted.

July 22.

THE COURT pronounced for the papers of 1837 and 1843, as the will and codicil of the testator, and decreed probate to the executors.

Proctors:—*Stokes*, for the executors; *Orme*, for the next of kin.

Judicial Committee of the Privy Council.

FEBRUARY 15.

Salvage. — THE CALEDONIAN STEAM TOWING COMPANY AND
Services rendered by a OTHERS v. HUTTON AND OTHERS. — *Appeal.* — *Cause* —
steamer to a This was an appeal from the High Court of Admiralty, in a

of salvage, by the Caledonian Steam Towing Company, owners, the master and crew of the steam-vessel Robert against Robert, William Mackintosh, and Robert Hutton, and Matthew and John Forster, the owners of the vessel Medora, of 110 tons burthen, bound from Africa to London, with a valuable cargo of gold dust and palm oil, for services rendered to that vessel. The Act on Petition, 1845, the Robert Bruce, of 120-horse power, and valued at £6,000, was proceeding towards the river Thames, when, about half-past one P.M., in consequence of a heavy gale from W. S.W., the vessels were driven to anchor near the Middle Oaze Buoy till the weather moderated; that about two, the Medora, which had been riding by both her anchors, about mid-channel between West and Middle Oaze Buoys, was observed driving rapidly towards the Mouse Sand, with her Ensign Union Jack hoisted in her main rigging, and firing signals distress; that Barrowby, the master of the steamer, immediately proceeded to get her under weigh, for the purpose of saving the schooner, and whilst so doing, the Orwell steamer approached the schooner, but left her, being unable, in consequence of the heavy sea, to get sufficiently near to board of her; that about three o'clock, the Robert Bruce, after great exertions, got within hail, when the master of the schooner entreated that the steamer would take hold of the schooner, which was then within half a mile of the breakers near Mouse Sand; that Barrowby, having disconnected the engines, whereby he was able to bring them to bear on the side, brought the steamer near enough to the schooner to throw a line on board of her, by which the steamer's hawser was hauled on board the schooner, and made fast to her foremast, the steamer being in great danger at this time of being dashed against the Medora by the rolling of the sea; that the schooner's cables being secured, the steamer commenced towing ahead, but the gale so violent that she was for some time unable to make headway, though she kept the schooner from driving further towards the sand; that she continued towing her in the

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*Caledonian
Steam Comp. v.
Hutton.*

vessel valued, with cargo and freight, at £11,000; the salvage reward of £250, allotted by the Court of Admiralty, increased on appeal to £500.

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Caledonian
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direction of Sheerness (the schooner being frequently drawn under water, as far as her foremast, by the great power of the steamer), where they arrived safely about 8 a.m.; that one of the schooner's cables had parted whilst she was at anchor during the gale, and her remaining anchor had proved insufficient to hold her, and she had no other anchor or cable; that the master of the schooner expressed himself thankful to Barrowby for his services, declaring that without them the schooner must have been lost, and gave him the following certificate:—

Medora, off the Mouse Sand, 17th September, 1845.

This will certify that Captain Bereby [Barrowby], of the steamer *Robert Bruce*, has rendered to us every assistance in his power readily and cheerfully, supplying us with warps and chains, besides the services of his steam-boat to tow us to Sheerness; and that, during the whole time he was with us, he exerted himself in every way with skill and ability to our entire satisfaction.

J. W. Thompson, Master, schooner *Medora*.
To the Directors of the Caledonian Steam Company.

The Act further alleged that the master of the schooner immediately left Sheerness for London, stating that he would send down an anchor and cable the next day, and that the *Robert Bruce* remained by the schooner during the night, and in the morning proceeded to the vessel she had left at anchor, and towed her to Gravesend, where she arrived about 2 p.m. of the 18th, and where Barrowby met the *Medora*'s master and her owners' agent, who stated they had not obtained any anchor and cable, and directed him to be at Sheerness by daylight next morning with the *Robert Bruce*, and put his own anchor and cable on board the schooner, and tow her to London; that the *Robert Bruce* accordingly arrived at Sheerness at 6 o'clock on the morning of the 19th, when Barrowby put his anchor and cable on board the schooner, and towed her to London, where she arrived between 3 and 4 p.m., the wind blowing very hard from S.W. the whole time.

On the part of the owners, the facts alleged by the

were admitted to be true in the main, although in its over-estimate.

admitted value of the ship, cargo, and freight, was £2,000. The action was entered at £2,000.

LUSHINGTON was of opinion that this was a most valuable service; that the *Medora* was in great need of it, and that the service had been attended with solicitation, and even some risk to the vessel's performance, and he considered that if he allotted £250 and the should give a proper reward for the service.

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Calcutta
Steam Company.
Hutton

1845.

Dec. 17.

a case of *The "General Palmer,"* in which a salvage service rendered, with comparative ease, by a powerful and valuable steamer. Dr. LUSHINGTON said:—"This is the service rendered, and I enquire whether £100 be a sufficient tender. What are the reasons to which the Court is to look in solving a question of this kind? First, the degree of danger to the vessel, and the absence of means to rescue her; and, secondly, whether what was effected or not. There is no doubt of the danger, or that it were effectual. It is most true that this service occupied minutes; but what was the reason why the service was of so much value? Because recourse was had to a steamer of 1,800 tons and of extraordinary power; because she was in a condition to perform services which never could have been executed by any other steamer. I am at a loss to conceive why a patient complain of the shortness of an operation; and yet that appears only ground of complaint made against the steamer. If persons in such a situation that it is desirable for their own safety to have the large value of £60,000 or £70,000, or, if there is no other way of having so extraordinary a power brought into action, yet they ought not to desire to pay less for such services than if they were rendered by another vessel of less power, and taking a longer time to perform them, and, in all probability, not performing them so well.

1844.

July 5.

These are some of the principles on which I consider myself to hold that steamers are to be paid in proportion to the value of the services actually rendered. It is not the mere time occupied; it is the labour, but the real value of the services rendered. It is not to consider what, in these circumstances would be the value of a steamer, of adequate power to effect the service; but it never can be expected that the owners of steamers will engage in these services, unless there be some remuneration. I am of opinion, looking at the value of the service, that £100 is not a sufficient tender, and I shall allot the sum of £250.

FEB. 15. From this sentence, the salvors appealed to her Majesty in Council.
Caledonian Steam Comp. v. Hutton. Sir John Dodson, Q. A., and Bayford, Dr., were heard for the Appellants; and Addams and R. Phillimore, Drs., for the Respondents.
 1847.
 Feb. 15.

JUDGMENT. LORD BROUGHAM.—Their Lordships are of opinion, under all the circumstances of the case, that too little was given in the Court below, and they, therefore, so far reverse the judgment, and give £500.*

Proctors:—*Deacon*, for the Appellants; *Rothery*, for the Respondents.

Archies Court of Canterbury.

Bye-Day.

FEBRUARY 18.

After sentence that Articles exhibited in virtue of Letters of Request against a Clerk in Holy Orders were proved, and a suspension thereupon for three years *ab officio et a beneficio*, — a motion on behalf of the Sequestrator appointed by the Bishop of the diocese (to whom the sentence was notified) for a Monition to shew cause why the party should

THE OFFICE OF THE JUDGE PROMOTED BY TROWER v. HURST.—*Motion, ex-parte.*—In Easter Term (3rd May), 1845, the Court pronounced that certain Articles exhibited against the Rev. John Hurst, Rector of Thakeham, Sussex, charging him with sundry immoralities (the cause being promoted, in virtue of Letters of Request from the Bishop of Chichester, by the Rev. Walter John Trower, a Rural Dean within the diocese), had been proved, and sentenced him to suspension for three years from all discharge and function of his clerical offices and the execution thereof, and from receiving any of the profits and benefits of the Rectory and benefice, and from receiving and taking the fruits, tithes, rents, profits, salaries, and other Ecclesiastical rights.

* The Committee consisted of Lord Brougham, the Master of the Rolls, Lord Campbell, Sir H. Jenner Fust, and the Chancellor of the Duchy of Cornwall (Mr. Pemberton Leigh).

† 4 Notes of Ca. 52.

dues, and emoluments whatsoever belonging and appertaining to the said Rectory; and directed that a copy of the Decree, duly certified, should be transmitted to the Consistorial Court of Chichester, in order that such sequestration might be there issued, or such other steps taken as the nature of the case and the exigency of the law might appear to require.

The party proceeded against alleged an appeal, which he abandoned, and the costs of the suit (in which he had been condemned) were paid. Meanwhile (July 18), a sequestration issued from the Court of Chichester, sequestering all the fruits, tithes, rents, profits, salaries, and other Ecclesiastical rights, dues, and emoluments whatsoever, belonging to the Rectory and to Mr. Hurst, the Rector, and authorizing Mr. Joseph Butler, as Sequestrator, to demand, collect, levy, and receive the same, committing to him the power and authority of the Court for the purposes aforesaid. By the affidavit of Mr. Butler, it appeared that he served a written notice upon Mr. Hurst, demanding possession of certain glebe land belonging to the Rectory, consisting of about thirty acres, in his occupation; that he caused a printed notice to be given to Mr. Hurst, as occupier of land in the parish assessed to a tithe commutation (the tithes of the parish being commuted) or rent-charge, to the effect that he (Mr. Butler), as

Sequestrator, should attend at an inn in the parish on the 22nd October to receive the same; that Mr. Hurst refused to yield up possession of the glebe land or to pay the rent-charge, and sent a notice to the Sequestrator not to demand or receive the tithes and emoluments of the Rectory, intimating that proceedings would be taken to set aside the Decree of this Court, and also sent a notice to tithe-payers of the parish not to pay any tithe-commutation or Ecclesiastical dues appertaining to the Rectory to any person save to the Rector; that the Sequestrator held an audit on the 22nd October, 1845, when many of the tithe-payers declined paying their tithe-commutation to him, in consequence of the notice of Mr. Hurst; that (after the abandonment of the appeal) in January, April, and October, 1846, he (the Sequestrator) held audits to receive the rent-charge, but Mr. Hurst, to whom due notice was given, did not

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*Trower v.
Hurst.*

not be pronounced in contempt for disobedience to the orders of the Court, by retaining the profits of the Living — rejected, on the ground that the Court of the diocese was the proper forum in the first instance, and that this Court could be set in motion only upon a return from the Bishop, the Ecclesiastical sheriff, of his inability to levy.

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*Trower v.
Hurst.*

attend or pay his rent-charge; that he (the Sequestrator) had repeatedly made application to Mr. Hurst for possession of the glebe land (on the 30th June, 1846, personally), and also for payment of the rent-charge due in respect of the land occupied by him, yet he continued in the occupation of the said glebe land, and had also taken possession of other glebe previously in the occupation of a lessee; that, on the said 30th June, Mr. Hurst promised to pay the Sequestrator the rent-charge, and also (if allowed to remain in possession of the same) to pay him such rent for the said glebe as a surveyor should put upon it; that the deponent informed Mr. Hurst by letter of the amount of the rent of such glebe fixed by a surveyor, but Mr. Hurst had not paid any money due from him under the sequestration; that the rent of the glebe due from Mr. Hurst amounts to £54. 15s. 8d., and the rent-charge to £79; that a further demand had been made of Mr. Hurst for the same, with an intimation that, if the demand were not complied with, it would be the Sequestrator's duty to bring his refusal before this Court; that Mr. Hurst had not up to this time paid any part of the said amounts, and that the deponent verily believes that the same cannot be recovered from Mr. Hurst without the aid and process of this Court.

ARGUMENT.

Haggard, Dr., on behalf of the Sequestrator, moved the Court for a Monition against Mr. Hurst to shew cause why he should not be pronounced in contempt for disobedience to the sentence of this Court. [PER CURIAM.—What is the disobedience to the sentence of this Court?] His continuance in the enjoyment of the profits of his Living. He occupies the glebe, and other lands from which he has ousted the tenants. This is a disobedience to the sentence. [PER CURIAM.—I suspended him *ab officio et a beneficio*; a Sequestration issued from the Chancellor of the Bishop of Chichester, and he must enforce it. This is not so much the receipt of the profits of the Living as a refusal to pay the demands made upon him. I want to know how the non-payment of the rent-charge is a disobedience to the sentence of this Court. This is quite a novel proceeding. If you shew he is still in possession of the profits of the Living,

strary to the sentence of this Court, that is a different thing; the first step is to prove that he has not obeyed the orders of this Court. Is it not the office of the Bishop of Chichester to enforce the Sequestration? And is not that Court to take the necessary proceedings? That may be one mode of proceeding; but that does not prevent this Court from enforcing its sentence. [PER CURIAM.—What was the object of the notice to the Bishop of Chichester of the sentence of this Court? That he may issue his Sequestration, and enforce it; and he did issue his Sequestration, and the Sequestrator is to certify to that Court what he had done. Must I not have a report from the Bishop of Chichester? How do I know, except from the affidavit of the sequestrator, that there has been any attempt to levy the costs?] I apprehend there is put before this Court a sufficient *prima facie* case to shew that Mr. Hurst is in contempt as to the sentence here, whatever proceedings may lie in another Court against him as Rector and tithe-payer. It is manifest that there has been a disobedience to the sentence of the Court as to one part, the suspension *a beneficio*. There has been no case precisely similar; but in *Moysey v. Milcoat*,* where there had been a disobedience to the sentence as regarded ministerial offices, this course was adopted, well as in *White v. Wilcox*,† where the party persevered in officiating without permission of the incumbent. *Bayford, Dr.*, on the same side.—The sentence of the Court consists of two parts: first, suspending Mr. Hurst *officio*; secondly, suspending him *a beneficio*. This sentence is not obeyed so long as Mr. Hurst is in possession of the glebe, and is himself not paying the rent-charge for the land he holds as a parishioner. If so, the sentence is resisted, and if this Court could enforce one part of its sentence, it would enforce the other, since the breach of one part is just as much an offence as a breach of both. The object of sending notice of the sentence direct to the Bishop of Chichester is, that, being the Ordinary, he is able to see that the sentence of this Court is carried into

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*Trower v.
Hurst.*

* 2 Hagg. E. R. 30.

† Consist. and Arches, 1833. Not rep.

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effect, by sequestration or otherwise. The authority of this Court remains precisely the same, and the Bishop of Chichester stands as a Sheriff executing process issued by a Court of Common Law. [PER CURIAM.—Does not the Sheriff make a return? I have no return from the Bishop of Chichester, and have no knowledge of what has been done in that diocese. Mr. Butler is directed to make his return to the Bishop of Chichester.] The proceedings not only affect Mr. Hurst, but the tithe-payers of the parish, whose accounts must be transmitted to the Bishop, and in regard to whom this Court has no authority. But as to Mr. Hurst, the matter stands on a different footing. All this Court wants to know is, whether he has complied with the Decree; if not, whether there is any other mode of proceeding against him: The Court pronouncing the Decree must necessarily have the power of enforcing it, when aware by legal evidence of the fact that the Decree has been resisted. This fact is proved by the evidence of the party appointed to receive the profits of the Living, who says they are retained by Mr. Hurst. [PER CURIAM.—You are proceeding against Mr. Hurst as a parishioner from whom tithes are due?] Yes, in one respect; but if Mr. Hurst does any act, whatever it be, hindering the Decree of the Court from being carried into effect, he is amenable; and he retains the glebe, the rents which are part of the profits of the Living. [PER CURIAM.—What would be the remedy of the Sequestrator if a holder of land in the parish did not pay his rent-charge? Because if there is a remedy against other tithe-payers, why is there none against Mr. Hurst?] The remedy we seek is a simpler one, though I am not aware of any other remedy except by process of law, which is open to very serious objection. If the Sequestrator is considered as a mere bailiff,* and not competent to support an action at law against a parishioner, *a fortiori* he could not against the Rector. I am not aware of any case in which the sentence of this Court has been enforced by an action at law.

* *Harding v. Hall*, 10 Mees. & W. 42 *Hubbard v. Bickford*,
1 Hagg. C. R. 311.

SIR H. JENNER FUST.—This is certainly a very novel proceeding in this Court, for I cannot call to mind any case precisely similar in its circumstances in which this Court has been asked to enforce its sentence against the incumbent of a parish whom it has suspended from the performance of Divine offices, and also from the receipt of the emoluments of the Living.

The mode of proceeding is this: after the sentence pronouncing that the Rector be suspended *ab officio et a beneficio* for three years, a notice of the sentence is given to the Bishop in whose diocese the Rectory is locally situated, so that he may take the legal means of enforcing obedience to the Decree of this Court. The Bishop is considered as the Ecclesiastical Sheriff; he is to levy and sequester, and to take care that the duties of the Living are performed, and the emoluments properly collected and appropriated; for which purpose a Sequestrator is appointed, who is to collect the profits and make a return to his Registry of what has been done: thus assimilating the practice to that of the Courts of Common Law. In the Courts of Common Law, the Sheriff is to levy, and if he cannot levy, he makes a return to the Court, which resorts to other means; and if the Bishop of Chichester had made a return, or certified, to me that he had appointed a Sequestrator, and that Mr. Hurst had refused to pay the Sequestrator, consequently, that the sentence could not be enforced, I might have granted a Monition to shew cause why Mr. Hurst should not be pronounced in contempt for disobedience to the orders of the Court. But here is a mere affidavit from the gentleman appointed Sequestrator by the Bishop of Chichester, of matters respecting which the Court knows nothing, except from the affidavit; and a motion is made for a Monition calling upon Mr. Hurst to shew cause why he should not be pronounced in contempt for disobedience to the orders of the Court—for this is the form of the motion now made; at first it was for payment to the Sequestrator of the sums due; this is certainly the better mode. But I am not in possession of information regularly transmitted to me as to the facts. The cases of *Moysey v. Hillcoat* and *White v.*

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JUDGMENT.

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Hurst.*

Wilcox were different from this case ; for there the Court had suspended the parties from the performance of Divine offices, and they continued to perform them, and the Court issued a Decree or Monition to shew cause why they should not be pronounced in contempt for disobeying the orders of the Court. So in this case, if Mr. Hurst had continued to perform Divine offices, the Court would have issued its Monition. But this is not the ground of complaint, which relates to the rents and profits of the Living, and it is necessary for that purpose that the Bishop of Chichester should make a return. I am not satisfied that I could grant the prayer on the ground that there has been on the part of Mr. Hurst a refusal to give up the occupation of the glebe. As far as I understand the affidavit, there has been an agreement between the parties that he should take the occupancy, paying rent. It may be that this rent, and the rents received from others, have not been paid ; but I must have a return from the Bishop of Chichester that Mr. Hurst has not complied with the terms of the sentence, by not paying what is due from him, and what he has received from other persons. Till then, I cannot proceed to decree a Monition to issue. I know what the inconvenience would be of issuing a Monition to shew cause ; that it would be followed up by a sentence pronouncing the money to be due to the Sequestrator ; but unless I am satisfied in the first instance that I have power to follow this up by pronouncing the party in contempt, and directing his contempt to be signified, I am unwilling to issue such a Monition, and I could not do it without a return from the Ecclesiastical Sheriff.

I am, therefore, of opinion that I am not in a situation to grant the prayer. Whether on a return from the Bishop of Chichester the Court would then enforce its sentence, is another question. Upon a full statement to the Court as to the circumstances, I might possibly be in a situation to grant the prayer ; at present, I am of opinion that I am not in a condition to do so, and I must refuse the motion.

Motion re-
fused.

Bayford, Proctor.

BLUCK v. HODGSON. — Appeal. — Cause. — This was an appeal from the Episcopal Consistorial Court of Norwich, in a business of shewing cause why a sequestration of the emoluments of the Rectory of Walsoken, Norfolk, should not issue, under the following circumstances. The Appellant, the Rev. John Bluck, was instituted to the Rectory in 1841. In 1843, the Bishop of Norwich, under the Pluralities and Residence Act (1 & 2 Vict. c. 106), issued a Commission to inquire whether there was a fit house of residence belonging to the Rectory; what was the clear annual profit of the benefice; and, if there was no house, whether a fit house could be conveniently provided on the glebe or otherwise. The Commissioners reported, 1st, that there was no fit house of residence; 2nd, that the clear annual value of the benefice was not less than £1,140; and, 3rd, that a fit house of residence could be conveniently built on a portion of the glebe. The Bishop, thereupon, procured plans and an estimate of the expense of building a house, and on the 9th November, 1843, transmitted to the patron of the benefice copies of the report, plans, and estimates, and served other copies upon Mr. Bluck, the Rector. The two months required by the Act having expired without any objection being made by either the patron or Rector, the Bishop (as empowered by the Act) borrowed of the Governors of Queen Anne's Bounty £2,040. 10s. 3d., the amount of the estimate, and executed a mortgage on the 30th August, 1844, a counterpart of which was forwarded to Mr. Bluck. Shortly after, the Bishop applied to Mr. Bluck for possession of a field of glebe land whereon to build the house; but Mr. Bluck refused to allow the Bishop to enter thereon, and the Act specifies no means whereby the Bishop can compulsorily take possession. The money borrowed, therefore, remained in a bank unproductive. The Governors of Queen Anne's Bounty applied to Mr. Bluck for payment of the instalments and interest on the loan (under sect. 62 of the Act), which he declined to make; whereupon (under the 67th section), Mr. Christopher Hodgson, the Treasurer of the Governors, instituted a proceeding in the Consistorial Court of Norwich, calling upon Mr.

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Where money had been borrowed, by the Bishop of the diocese, of the Governors of Queen Anne's Bounty, under the Act 1 & 2 Vict. c. 106, upon mortgage, for the building of a house of residence, and the Rector refused to allow the Bishop to enter upon the portion of the glebe land which the Commissioners had reported might be appropriated to that purpose: — Held, that the treasurer of Queen Anne's Bounty was not competent to maintain a suit for the instalments of and interest upon the loan.

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Bluck to shew cause why a Sequestration of the profits and emoluments of his Rectory should not issue to Mr. John Burder, the solicitor of the Governors of Queen Anne's Bounty, and why the Rectory should not be sequestered until payment of the sum of £206. 13s. 8d.—namely, £138. 13s. 4d. for two years' interest upon, and £68. 0s. 4d., one instalment of one-thirtieth part of, the principal sum of £2,040. 10s. 3d.;—upon an affidavit of Mr. Hodgson that Mr. Bluck was justly and truly indebted to the said Governors in the aforesaid sum of £206. 13s. 8d., by virtue of the mortgage. Mr. Bluck, not appearing, was pronounced contumacious, and the Sequestration was decreed. From the issuing the Sequestration, Mr. Bluck appealed to this Court.

1846.
Sept. 28.1847.
Feb. 9.
ARGUMENT.

Sir J. Dodson, Q.A., for the Respondent.—The Bishop is empowered under the Statute to sequester the Living, there being no appearance on the part of Mr. Bluck, who was pronounced contumacious, and the proceedings have been regular.

Curtis, Dr., for the Appellant.—I submit that the whole proceedings are null and void. Mr. Hodgson has no right to sue, and the service of the Citation or Decree has been irregular.

Sir J. Dodson.—With respect to the first objection, the Governors of Queen Anne's Bounty are a Corporation, which has a right to sue by its Syndic, or Treasurer. That is the rule of the Civil Law.* As to the second objection, the Decree was issued in the diocese of Chichester (Mr. Bluck being resident at Brighton), and served by the Apparitor of that diocese upon Mr. Bluck personally. A copy was not left, according to our mode of proceeding, but a notice, which is the old mode, and, according to Oughton, the regular mode.

Jenner, Dr., on the same side.

Curtis.—Without the Act of Parliament, there would be no power to charge the Living with this money; and where a power is given by Act of Parliament, the Act must be

* Dig. lib. iii. tit. 4, s. 1.

implied with. Here is no averment when Mr. same Rector of Walsoken. For any thing that the proceedings, he may have been Rector before the Act passed. *Blunt v. Harwood*.^{*} There is no doubt there is an interlocutory Decree having the effect of a definitive sentence. Supposing Mr. as Treasurer of the Corporation, has a right to be not sued regularly: all we have is his affidavit and the Jurat omits the words "before me," which *Reg. v. Inhabitants of Bloxham*.[†] Dr. Daubeney, administered the oath, had no authority to do so, not arrogate of the Bishop of Norwich. No copy of the writ was served, and there is no intimation in the writ. But there is nothing to shew that the Treasurer of the Priory of Queen Anne's Bounty has a right to sue; no common seal; there has been no appointment of

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and Dr., on the same side.—This is a case in which it ought to be in strict accordance with a law put in effect for the first time. The debt which is said to have incurred arises under an instrument mortgage to which he was not a party, and it is shewn that it concerned his own parish.

Dodson, in reply.—There may be doubts whether *REPLY.* *Hodgson* has sufficient power to sue: I admit upon that there is considerable difficulty. He has not an authority under the Charter.

Hodgson stood over for further inquiry as to this point.)

Dodson.—I am afraid we are not in a condition *FEB. 18.* that Mr. Hodgson, as the Treasurer of Queen Anne's Bounty, has a right to sue. [PER CURIAM.—I do not think, as Treasurer, he has any right to sue, as I understand the Charter.] If this is a suit, we cannot maintain it, as he can be a party. This is a case in which a Sequestrator has been allowed to go out merely on the affidavit of *Hodgson*, without a Monition. It is the first instance of a process going out at once. In *Abbott v. Gurney*,[‡]

t. 649.

† 6 Q. B. Rep. 528.

‡ 2 Notes of Ca. 75.

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in the Consistory Court of London, a Sequestration went out upon a Motion before the Judge, at the instance of creditors, after notice to the party.

JUDGMENT.

SIR H. JENNER FUST.—Since the objection is taken, I am bound to attend to it. I pronounce for the appeal, and reverse the sentence appealed from, and I am bound to give the costs of the appeal. I must declare the Sequestration to be null and void, and dismiss Mr. Bluck.

Let the Decree be settled between the Proctors out of Court.

Proctors:—*Engleheart*, for the Appellant; *Jenner*, for the Respondent.

High Court of Admiralty.

Add. Court Day.

FEBRUARY 20.

Collision. — Construction and application of Trinity House Rules. — Variation of ground of defence set up by Plea in Argument.

THE "ENGLAND."—*Cause, by Act on Petition.*—This was an action of damage by collision brought by the owners of the *William Broderick*, of 242 tons, against the *England*, of 893 tons. Both vessels were, at the time of the collision, between 5 and 6 o'clock in the morning of the 8th August, 1844, proceeding up the River St. Lawrence, the wind, "a good working breeze," being westerly, the *William Broderick*, in ballast, being on the starboard tack, standing to the southern shore, and the *England*, with a cargo and 150 emigrants, on the larboard tack, standing to the northern shore. The weather was thick and foggy. The owners of the *William Broderick* imputed the accident to the misconduct of those on board the *England*, alleging that, being close-hauled, she (the *William Broderick*) kept her course, and the *England* should have put her helm up, and avoided her, whereas she kept her luff. On the part of the *England* it was asserted that she put her helm down, and

the other vessel did the same, instead of continuing
 course, and she did not keep a good look-out or blow
 g-horn; so that the collision was either the result of
 an avoidable accident, or the fault of the other vessel.

The Court was assisted by Trinity Masters.*

Leading, Dr., for the *William Broderick*.—The first ARGUMENT.

question is, whether the other side are entitled now to set up
 a plea of inevitable accident, since, in their Answer to our
 depositions they allege that the collision was "solely and entirely

caused by those on board the *William Broderick* not having
 kept a good look-out, and not having taken the requisite pre-
 cautions, during foggy weather, of sounding the bell or fog-
 horn, and by putting her helm down, instead of continuing
 her course." If this change of ground be permitted, how
 can the Court prevent in all cases the line of defence set up
 by the Act on Petition being abandoned in Argument?

BE CURIAM.—This objection struck me when I heard
 the opening on the other side, whether, having stated
 the ground upon which they meant to rely, another ought
 to be set up. I mentioned this to the Trinity Masters.

James, Dr., *contra*.—We are coming to special pleading.
 The plea of inevitable accident is apparent from what we
 have in the Act. We plead the thickness of the fog, and
 that it was impossible to see more than half the length of
 the ship; and is there any rule of pleading which precludes
 us from arguing, upon an Act so framed, that, as to
 the *England*, the collision was the result of inevitable acci-
 dent, no blame being imputable to this vessel?

Leading.—According to the facts, we being close-hauled
 on the starboard tack, and keeping our course, the *England*,
 on the larboard tack, *prima facie*, according to the
 Rules of Navigation, was in the wrong, and it lies on
 her to justify herself. The real questions are, first, as to
 the distance at which the vessels could be seen from each
 other; second, as to which vessel saw the other first;
 third, at what distance.

Phillimore, Dr., on the same side.—It is important, if
 the facts are laid down, that they should be strictly adhered to.

* Captain Wellbanke and Captain Bax.

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Addams.—We say that the *England* was to the leeward of the *William Broderick* at the time of the approximation of the two vessels to each other; and this allegation is not denied. We allege that, when the other vessel was seen from the *England*, she was close on the *England's* lee-bow. This plea is not distinctly and explicitly denied. But this is the point upon which the whole case turns, for if we saw the other vessel a short distance to leeward and on our lee-bow, the Rule did not apply. The application of the Rule depends upon how the two vessels were approaching each other.

Bayford, Dr., on the same side.—The whole of the case turns upon the nicety of the distance at which each vessel was visible from the other.

JUDGMENT.

Dr. LUSHINGTON (addressing the Trinity Masters).—Gentlemen, this case has been argued before you at very considerable length, and some particulars have been dwelt upon with great minuteness, the importance of which I have not been able to discover. But it is necessary that I should bring under your consideration certain matters appearing in the pleadings.

Delay in
 bringing the
 action.

First, with regard to the delay which has been imputed to the parties who bring this action. It is abundantly clear, that, whatever may be the effect of that delay, the action was brought within time, and the Court is bound to entertain the action, and determine it on the merits of the case. But it is equally true that, if the Court sees that there has been too great delay in prosecuting a proceeding of this description, it always considers that, if there be any difficulty in proving the case on the one side or on the other, it ought to be ascribed to the party who has been negligent, or at least not vigilant, with regard to his own interests. On the present occasion it appears to me, that if proper measures had been followed up, the owners of the *England* would have been discovered much sooner than they were. I cannot conceive it possible that the owners of a vessel of between 800 and 900 tons, belonging to Liverpool, might not have been discovered by ordinary diligence. But then

there comes this fact, which is a great extenuation, namely, that the agent of the Company to whom the *William Broderick* belonged, and who had been intrusted with the charge of these inquiries, became insane, and has since been confined in a lunatic asylum, and the owners could not find out what was done or not done. The utmost extent to which the effect of this delay could be carried is this, that if it had happened that evidence could not be found sufficient to prosecute the case, then it must have failed. But it turns out that we have almost all the witnesses who could give information; so that the delay is not of any importance to the ultimate result of the case.

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There is another matter of infinite importance, not only The Rules. with regard to this case, but to the regularity of all our proceedings; that is, what are the Trinity House Rules in such a case? I have, over and over again, with the distinct approbation of gentlemen from the Trinity House, stated the Rule applicable to these cases, to the utmost of my power, in the clearest and most distinct manner I could. I apprehend it is this: Where two vessels are on a wind, that on the larboard tack is to give way to the one on the starboard tack. Now, we have had a long discussion as to whether the *William Broderick* was to windward or to leeward of the *England*. Why, if it had been broad daylight, you have always said the Rule applies, whether the vessel be to the windward or to the leeward, if there be a reasonable chance of collision. Nobody ever said that the Rule applied where, each vessel keeping its course, there was no chance of collision; but you are not to speculate upon the matter whether the vessel was a little to the leeward or a little to the windward; but you are to obey the Trinity House Rule, even in broad daylight. Therefore, I must say I have been a good deal astonished at the long discussion as to whether the vessel was to windward or to leeward of the *England*.

I must now make an observation or two with reference to The Pleadings. the pleadings in this case, and it is really not an unimportant matter; for, although we cannot, in this mode of conducting a cause, proceed with the strictness and accuracy observed in other modes of action, yet it is of great import-

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ance that the facts of the case should be clearly stated, and that it should be most distinctly set forth upon what ground each party relies in seeking to obtain the decree of the Court. Now the case set up on the part of the *William Broderick* was a very plain one: "You saw us in time; you ought to have put the helm up, and did not; you are to blame; we kept our luff." The answer is—"The Proctor for the *England* denied that the collision was solely and entirely, or at all, owing to the negligence or want of skill of the crew of the *England*;" but he alleged "that the same was solely and entirely caused by those on board the *William Broderick* not having kept a good look-out, and not having taken the requisite precautions, during foggy weather, of signifying her presence or approach—to wit, by sounding the bell or fog-horn, and by putting her helm down, instead of continuing her course." One would naturally understand this to mean, "We were right in what we did, and you were wrong in what you did, because, in the first place, you were negligent—you did not sound the bell or blow the horn; in the next place, you altered the helm, and the collision was solely and entirely caused by it." I had the greatest difficulty in getting over these words, because the real issue in the case is, whether it was so foggy that the *England* could not see. I confess I felt very strongly the objection of Dr. Harding, and I mentioned it to you, Gentlemen, before it was taken. I felt it, indeed, so strongly that, but for another circumstance, I must have given it an overwhelming weight. But I find it alleged on the part of the *England* (after stating the facts nearly the same as they are stated on the other side), "that it was impossible to see more than half the length of the ship, when a ship was seen by the wind, close on the *England's* lee-bow, from which she was then not further distant than about twenty yards." Now, if the Act had gone on to say, in so many words, that it was perfectly impossible to have seen the other vessel till she was so close that they could not obey the Trinity House Rule, and that they were forced to do the best they could under the circumstances, it would have been all clear. But we have to collect the defence

facts stated, and I am of opinion that such defence collected from such facts; but it is a misfortune should have to collect it from the facts. Nor do I the other party could be deceived; if I did, I must differ view of the matter: for I find that the affidavit made subsequent to this averment contradict the it as to the weather, and say that it was not so represented. Therefore, we are at liberty to con-
th points.

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England.

respect to the *William Broderick*, therefore, as far Merits of the
form a judgment, she did nothing wrong. I put it case.
judgment what was the conduct of the *England*,
question is, under what circumstances she was act-
that did she do? She ought to have obeyed the
she could; it is upon her to prove that her case is
pion to the Rule. She says, "I could not obey the
cease the weather was foggy," and she must prove
it was the fact. If you acquit the *England*, you must
a the conviction that she has distinctly proved her
it and exception, that the morning was so foggy
could not see the other vessel. Recollect that all
as to rules require to be strictly proved; and you
t relax such a Rule as this.

let us consider the probabilities of the case. There
favour of the *England*, namely, there is no denial
g on the other side: so far the probabilities are in
of the *England*. There are two other circumstances,
ich you will decide whether they are of any weight.
weather was so extremely foggy, ought the masters
have been on deck? Both of them were not on
hich is strange conduct if the weather was so foggy.
er point is this: if the weather was so foggy, why
at all?

will observe that it is a very nice question, because,
believe the evidence given for the *William Broderick*,
England was seen at a distance of 400 yards—the
l being a large vessel, and the other high in the
eing in ballast—I apprehend there would have been
have prevented the accident by obeying the *Trinity*

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House Rule. But when a man measures 400 yards at sea he is not always accurate. You will take into consideration that the master and the pilot were below, and had to come on deck; and how long we may expect it would occupy to get on deck. You will give due weight to all the circumstances of the case, not omitting the local peculiarities of the river.

OPINION.

CAPT. WELLBANKE.—In reply to the last question, respecting the masters not being on deck, perhaps the captain had the middle watch, and the chief mate succeeded; therefore, we do not think the masters were to blame in this respect. It is acknowledged by both parties that the fog had been very thick up to the period of the collision. On the part of the *William Broderick*, some of the witnesses fix the space between seeing the vessel and the collision at three minutes, and some at five. The master of that vessel says that, upon hearing the mate hail the vessel, he jumped out of bed and ran on deck without his clothes, and the collision occurred immediately; and the *England* alleges that she did not see the *William Broderick* until they were very near each other. Therefore, under all the circumstances of the case, we consider that they were so close when first seen that the collision was inevitable, and we attach blame to neither party.

JUDGMENT.

PER CURIAM.—I dismiss the *England*, with costs.

Proctors:—Bowdler, for the *William Broderick*; Rothery, for the *England*.

Add. Court Day.

FEBRUARY 22.

Upon objection to the Registrar's Report, in a cause of damage by collision:—
Held, that the party damaged and obtaining judgment was entitled to interest upon the amount paid
THE "HEBE."—*Act on Petition*.—This was originally a cause of damage by Mr. George Danby Palmer, the sole owner of the schooner *Rose*, against the brig *Hebe*. On the 15th May, 1846, this Court, without opposition, pronounced for the damage, and referred the same to the Registrar and Merchants, whose Report was now objected to. The collision, which was the cause of the damage, took place on the 3rd December, 1844, at which time the *Rose* was on a voyage from Newhaven to Newcastle, in ballast. After the

collision, the schooner, having been deserted, was assisted into Portsmouth, where she was repaired, and whence she proceeded to Great Yarmouth.

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On behalf of the sole owner of the *Rose* (who objected to the Report), it was alleged that, shortly after the collision, Mr. Palmer authorized Capt. Clifton, a person of great experience at Yarmouth, to proceed to Portsmouth and superintend the repairs, and he remained there until they were completed, on the 7th February, 1845, thereby preventing much unnecessary expense and delay; that the Registrar and Merchants had disallowed the whole claim of £22. 1s. 6d. for the expenses of Capt. Clifton, and £21 for his loss of time, on the ground that Messrs. Garratt and Gibbon, of Portsmouth, acted as the agents of Mr. Palmer, and that the master of the *Rose* was on the spot; whereas, the only manner in which Messrs. Garratt and Gibbon acted as agents for the owner was, in advancing money for and discharging the bills for the repairs, for which they had made a charge of 2½ per cent. on the amount advanced, and the master of the *Rose*, besides being too unwell to attend to the repairs, was utterly incompetent to superintend them; that the bills for the repairs, salvage, and other expenses connected therewith, amounted to £408. 18s. 2d., of which only £391. 2s. 7d. had been allowed, without any reason being assigned for the deduction; that after the schooner arrived at Yarmouth, sundry work was done on her at the expense of £5. 3s. 7d. (being only the finishing of the work done at Portsmouth), which had been disallowed; that, at the time of the collision, a quantity of provisions had been on board the *Rose*, which were stolen by some persons who boarded her after the collision (the crew having been obliged, for the preservation of their lives, to leave her), which were replaced at Portsmouth at a cost of £5. 18s. 8d.; that the expenses of the master and crew in Portsmouth, and of the master in travelling home to Yarmouth, and back to Portsmouth, when the repairs were finished, amounted to £4. 14s., and these two items, with £1. 4s. for setting up the rigging, made £11. 16s. 8d., of which only £7. 2s. 8d. had been allowed; that a claim for demurrage, at the rate of £2 per

for the repairs from the date of payment, not from the date of the Decree only; and the Report upon that item amended.

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dicm, during the period of the schooner's detention at Portsmouth, was refused to be allowed by the Registrar and Merchants, who required that the owner's books should be produced for their inspection, which Mr. Palmer had declined, stating (in an affidavit) that, during the time of her detention, the *Rose* might have made two voyages, with full cargoes of coals, between the north and Yarmouth, and would in all probability have earned a net profit of £56, and the Registrar and Merchants had allowed only £30 for demurrage; that the whole of the bills for the repairs and other expenses were paid in January, 1845, notwithstanding which the Registrar and Merchants had only allowed interest on the amount reported by them, computing from the 15th May, 1846, the date of the Decree pronouncing for the damage; whereas, inasmuch as the *Hebe* was at the time of the collision bound on a voyage to Ichaboe, and proceedings could not have been commenced against her in this Court until her return, interest should have been allowed from the date of the payment of the account.

In their Answer, the owners of the *Hebe* alleged that the sums claimed on account of Capt. Clifton had been properly disallowed, for the schooner, having been abandoned by her master and crew after the collision without sufficient cause, was fallen in with and taken to Portsmouth, and there placed by her owner in the hands of Messrs. Garratt and Gibbon, ship-agents, who had the damages of the schooner surveyed, and a respectable shipwright entered into a contract for doing the repairs, so that, if the owner thought fit to employ Capt. Clifton, it should be at his expense; that the Registrar and Merchants had good reason for reducing the amount of repairs, salvage, and other expenses, a sum of £8. 3s. 6d., for instance, having been incurred on the owner's account, irrespective of the damage occasioned by the collision (as appeared from the account produced by the owner of the *Rose*); that the repairs consequent upon the collision were completed at Portsmouth, and therefore the owners of the *Hebe* were not liable for the subsequent repairs at Yarmouth; that the sums claimed for the master's journeys to London and Yarmouth and back to Portsmouth

were properly disallowed ; that, with respect to the demurrage, £30 (the sum allowed) far exceeded the probable earnings of the schooner during the detention ; and lastly, that the Registrar and Merchants, in reporting interest payable on the amount of their award from the date of the Decree until payment made, had acted upon the settled practice in that particular, and there was nothing in the circumstances of his case which would have warranted their departure therefrom.

Jenner, Dr., in objection to the Report; Addams, Dr., in support of it.

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DR. LUSHINGTON.—There are three courses open to the Court with respect to such objections as these ; either to confirm the Report, if the objections are unfounded ; or to send it back to the Registrar and Merchants ; or to make, on its own authority, such alterations therein as it may think fit.

The original cause, out of which this proceeding has arisen, was a cause of damage, which was admitted by the owners of the *Hebe* to have been done to the *Rose*. It was an ordinary case of damage, and was treated on the same principles as those which I thought applicable to *The "Galleys"** in which case I stated those principles, and I have not the slightest intention of deviating from them. The great principle is, that he who does the damage, being the wrongdoer, must bear the consequences ; and he who has sustained the damage is entitled to full indemnification.

I will take the objections in the order in which they were mentioned by Dr. Jenner, on behalf of the owner of the *Rose*, and who objects to the items allowed as indemnification for the damage sustained by that vessel. The sum claimed for repairs, salvage, &c., amounted to £408. 18s. 2d., and the sum allowed is £391. 2s. 7d. The question is, why the Registrar and Merchants declined to allow the full amount ; and I regret to say that I am under the necessity, where an objection has been taken, of examining it, however minute the sum may be, and whether it be an error in point of law

The objections.

* 3 Notes of Ca. 75. 2 Rob. jun. 279.

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or in point of fact ; though it is perfectly consistent with the performance of my duty to place that confidence in the Registrar and Merchants to which their knowledge and experience fully entitle them, and not to disturb the Report unless I am satisfied it is erroneous. Here there is a difference of £17. 15s. 7d., out of which £8. 3s. 6d. it is admitted ought to be deducted from the £408. 18s. 2d., and therefore there remains only a small balance on which I am to give my opinion, and of which undoubtedly I have no explanation. But in cases of this description, the Court will not go into either the *minutiae* of the objections or the *minutiae* of the defence, because I have the opportunity of referring to the Registrar, and, knowing the principles on which the account has been made out, it would be very unnecessary to state the minor items in detail, when I am informed by the Registrar and Merchants that the difference arises from their having considered some charges superfluous, and some too high. I see no reason to doubt that their discretion was properly exercised ; therefore, I am of opinion they are right in allowing £391. 2s. 7d., and it lay on the other side to shew they were in error.

I must now look to the other items, and one of the most important is the expense of Mr. Clifton going down to the vessel, and the sum charged for his remuneration in acting as the agent for the owner of the *Rose* in the superintendence of the repairs. The sum charged is £43. 1s. 6d.—more than ten per cent. upon the whole amount laid out. The question is, whether I am to allow this sum, and also 2½ per cent. to Messrs. Garratt and Gibbon, as agents, in addition. It would be exceedingly onerous if these large items were allowed. It is not clear in what way this vessel came into their hands as agents for the *Rose*. Messrs. Garratt and Gibbon do not appear at first as agents of the owner of the *Rose*, though to all intents and purposes, to a certain extent, they became his agents ; and there is this objection : “ that the only manner in which Messrs. Garratt and Gibbon acted as agents for Mr. Palmer was, in advancing money for and discharging the several bills for the repairs, and for which they have made a charge of only £11. 0s. 9d., being at the

rate of 2½ per cent. on the amount advanced by them." Now to a certain extent they were the agents of the owner of the vessel, Mr. Palmer, of Yarmouth. But the master was also on the spot, and one of the reasons assigned for the employment of Mr. Clifton is, that the master was sick. If the fact was so, his sickness is no reason for saddling the owners of the *Hebe* with the expenses incidental to it. He was the servant of the owner of the *Rose*. But surely the master was competent to matters of this kind, and if not, where was the necessity of sending a person from Yarmouth, and making this exorbitant charge? I am of opinion that the Registrar and Merchants have with great propriety decided against the claim, and so far I confirm the Report.

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I think the objection as to repairs done at Yarmouth were hardly sustained in Argument, because, after the vessel had made a voyage to Yarmouth, it is impossible to say to what extent these repairs might have been occasioned by that voyage. But if it were possible to demonstrate it, all the necessary repairs ought to have been done at once at Portsmouth. Therefore, I have no hesitation in saying that I agree with the Registrar and Merchants as to this item.

The next objections (which resolve themselves into one) refer to the journeys of the master and mate of the *Rose*, and I am at a loss to understand upon what principle the expenses of their journeys from Portsmouth to London and Yarmouth, and back again to Portsmouth, could be allowed. I see no ground upon which these charges can be substantiated at all.

With regard to the demurrage, I certainly should have Demurrage. been better pleased if there had been something like evidence produced on the other side; but as it is, I must treat it as I can, and it stands thus: The Registrar and Merchants consider that the vessel was detained for fifty-three days, and the owner of the *Rose* makes it a fortnight longer, upon what precise principle I cannot conjecture, unless it is that, *de facto*, she did not quit Portsmouth till the 7th February, 1845. It is clear that, in the legal sense of the word, the vessel was not detained at Portsmouth when all the repairs were done, and indemnification was duly made. I am of

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opinion that the owner of the vessel run down is entitled to demurrage, upon the ground of what would have been the probable amount of the earnings of the vessel during the period of her actual detention. But what evidence have I of that amount? The original demand was £134; objection was made to the extravagance of that demand, which came to be reduced to £56, and this claim was supported by the affidavit of Mr. Palmer, that, during the time of the schooner's detention, she might have made two voyages, which would, in all probability, have earned a clear net profit of £56. He is called upon to produce his books, to shew what the vessel had earned, which he thought fit to decline, and it might be inconvenient to a gentleman engaged in extensive business to do so. But the books are the best evidence of what the vessel had earned, and if he produces inferior evidence, he must take the consequence. Two or three other vessels, it is said, did earn the amount; but I am of opinion that the argument of Dr. Addison is very well deserving of attention. It is not what ~~another~~ vessel earned, but what is the reasonable probability (all contingencies taken into consideration) this vessel would have earned between the 4th December and the 25th January, and any calculation made from an extended time has nothing to do with the question. I see no reason, therefore, to satisfy my mind that the Registrar and Merchants are in error as to this item.

Interest.

The last item is one on which I entertain very considerable doubt; because, if I am right in my original principle, those who receive damage are entitled to have full indemnity, and to be restored to the state in which the vessel originally was; and this principle has been carried to such an extent in Courts of Common Law, that they are entitled to have new timber put in without the deduction of one-third allowed to underwriters in insurance cases. I must consider that this principle is to be strictly followed out in all points; and is it followed out by allowing legal interest from the date of the Decree only? The money was due to the owner on the 25th January, 1845, and, according to the Report, the interest was allowed to run only from the 15th May, 1846

I do not think the burthen ought to fall upon him, for the party proceeding, ought to have been paid the key on the 25th January, 1845, and might have been king interest upon it. I am bound to follow out the principle I have mentioned, and to hold that the interest should be paid from the 25th January. If there had been discount allowed for the repairs, it might have been a rent thing; but the contracts were for ready money.

course I shall follow is, not to refer the Report back, Report amend-
make the necessary alteration in this item; and as this ed in one item.
be only item altered, I do not make any decree as to
but leave each party to pay their own costs from the Costs.
of the Report.

vectors:—*Jenner*, for the owner of the *Rose*; *F. Clarkson*, for the
ers of the *Hebe*.

PR. 22.

Hebe.

Prerogative Court of Canterbury.

FEBRUARY 23.

Bye-Day.

THE GOODS OF MARGARET ELIZABETH LUFFMAN, 1. A will of
STER, DEC.—*Motion, ex-parte*.—The deceased died 1844, subscrib-
October, 1846, leaving a brother and two sisters by ed by two wit-
half-blood, her only next of kin. She made her will, nesses, the at-
d 8th May, 1844, and a codicil thereto, dated 10th Oc- testation-
r, 1846. By the will she appointed her brother, Alfred clause imper-
L. Luffman, sole executor and residuary legatee. In fect; the wit-
ber, 1844, she informed Mr. Luffman that she had nesses, not-
w her will; that he was her executor, and that on her withstanding
d he would find it in her bonnet-box, with other things diligent in-
ed up, which he was to deliver to the persons to whom quiry, not be-
were directed. About ten days before her death, Mr. ing forthcom-
Luffman and his sister were sent for, in consequence of the ing, the Rule of
deceased's dangerous illness, and on the arrival of Mr. Luff- Court, requir-
y the deceased, in conversation with him, referred to her ing an affidavit
leg made her will, and pointed to a box in her bed-room from them, un-
and bequeath- der the circum-
stances, dis-
penssed with.—
2. A paper, in-
tended as a co-
dicil to the will,
and bequeath-

FEEL. 23. where it would be found at her death. Shortly prior to her death, she also informed her sister, C. L., where her will would be found, and directed her, upon her (deceased's) death, to hand the same to her brother. On the night after the deceased's death, C. L. took the deceased's keys, and on opening a small Russia maple box in her bed-room, found a parcel, sealed with the deceased's seal, and indorsed, "The last Will and Testament of M. E. Luffman, to be given to Mr. Alfred Luffman;" as also some small parcels, containing some trifling articles of jewellery, directed by the deceased to various persons, which are also referred to as such in the deceased's will. This parcel was delivered by C. L. to her brother, opened by him, and found to contain the will of the deceased, to which were the names of two subscribed witnesses, Jane Carr and Ellen Dee. The attestation-clause being imperfect, it became necessary that the witnesses should make the usual affidavit; but, notwithstanding the most diligent inquiries, and advertisements in the *London Gazette* and two newspapers, no clue could be obtained as to who the witnesses were. The codicil was made under the following circumstances. Mr. John Wiblin, surgeon, attended the deceased professionally for two years prior to her death, and during her last illness. About three weeks before her death, she expressed to Mr. Wiblin her wish that Mrs. Davis, the daughter of Mrs. Coles, with whom the deceased lodged, and Mrs. Coles's servant, should be remembered after her death for their attention to her, and then requested Mr. Wiblin to take charge of any money that she might possess at her death, and make such remuneration to the said parties as he, in his discretion, thought proper. To this Mr. Wiblin objected, and suggested the propriety of her wishes being reduced to writing as an addition to her will (which the deceased stated to him she had made, whereby she had appointed her brother, Alfred Luffman, executor); and at her request, and in her presence, Mr. Wiblin drew up a paper, beginning, "This is the last will and testament of Margaret Elizabeth Luffman." This paper was read over to the deceased by him, and, at her request, by the attesting witnesses thereto, and afterwards duly executed

Luffman, dec.

ing only two small legacies, described, by the deceased's death, C. L. took the deceased's keys, and on misapprehension of the writer, as the "last will and testament" of the deceased, admitted into the probate as an "addition" to the will.

the same day. Neither Mr. Wiblin nor the attornies ever saw the deceased's will of 1844, and he states that he drew up the paper (termed the will in its present form, in total ignorance that it ought to have been expressed as a codicil. At the deceased's death the paper remained in his custody, and it was given by him to Mr. Luffman the day after the deceased died. The property is under £200.

FEB. 23.

Luffman, dec.

Dr., moved for probate of the will and codicil to the **MOTION.**

The law on the first point is laid down in *Burgoyne v. Dumas*.* [PER CURIAM.—What is the true description of the paper? Is it a codicil or a will?] It is not in fact a codicil; but I submit that it is, in the eye of the law, a codicil to the deceased's will.

JENNER FUST.—It is quite clear from the circumstances that it was not intended to revoke the former paper. As to that paper, the attestation-clause being defective and the subscribed witnesses not forthcoming, the question is, whether it can be considered as having been executed by the deceased. According to the Statute, "no attestation is necessary," and probate would have been granted but for the Rule of the Court (a very wholesome one), that, where there is an imperfect attestation, there should be an affidavit by the attesting witnesses of the due execution. It never could have been the intention of the deceased to misrepresent the fact by signing the names of the two witnesses herself. It is an unfortunate circumstance, but, the paper being in the form of a will and having the names of two witnesses subscribed to it notwithstanding all possible steps have been taken to produce their evidence, they are not forthcoming, can the Court refuse to grant probate of the paper? I think it cannot.

Suppose the witnesses were dead? I am of opinion that the Court must accept this as proof *prima facie* of the due execution of the will.

Dr. moved for the death of the deceased, wishing to make

* 3 Notes of Ca. 204. 1 Robert. 5.

Fza. 23. a pecuniary recompense to two persons who attended her during her illness, she requested the medical gentleman who attended her to draw up a paper, the effect of which was to give £15 to the daughter of the person in whose house he was lodged, for her attention to her during her illness, and to the servant, on the same account. There is no disposition of the bulk of the property (which is all under £1000) is confined to these bequests of £17. The paper was executed, but it is described as "the last will and testament" of the deceased. There was, however, no intention to revoke the former will; and is the revocation of a will to be effected by the mere execution of such a paper containing bequests to the amount of £17? I think not. I consider that this was meant to be an addition to the will, and therefore I decree probate of the two papers together containing the will of the deceased. I do not decree this latter paper as a codicil, which it is not, but as a paper in addition to the will.

Probate decreed.

It is unfortunate that the witnesses are not forthwith produced, but what is the Court to do under such circumstances? There is no opposition.

Tatham, Proctor.

Where unattested alterations appeared in a will, without extrinsic evidence as to whether made before or after the execution, and a codicil bore date two years after that of the will, the Court, upon internal evidence, decreed probate with the alterations, as made at least before the execution of the codicil.

IN THE GOODS OF PHEBE BRADLEY, WIDOW, Motion, ex-parte.—This was a renewal of a motion in the Bye-Day of last Term.* The deceased died in 1846, having made her will, in January, 1843, all in her own handwriting, which exhibited several erasures which words were written, and alterations by writing in the margin, none of them being attested. At the end of the will was the following memorandum, signed by the deceased: "I have made several erasures in this my will, which are made by my own hand. A codicil, dated 21st February, 1845, duly executed, revokes a legacy bequeathed by the will, under a certain agency, was attached to the foot of the will by sealing it up. No evidence could be obtained as to whether the alterations were made before or after the execution of the will."

* *Ante*, p. 95.

in the will were made prior to its execution, or the codicil at the time of its execution was annexed

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Brodley, dec.

COURT rejected the motion for probate of the papers stood.

tion was now renewed, upon proxies of consent parties interested.

Dr., in support of the motion.—Although, under Motion, the consent of the parties would not justify the decreeing probate as prayed, if there was any possibility that the alterations were made after execution; there is no evidence either way, the Court may make it upon consent.

JENNER FUST.—If I were to direct these papers DECREE. founded, I think the Court would be left in the position as it is in now, and the parties interested in the case should be decided upon affidavits instead of proof. I find the difficulties of the Court in the case of alterations multiply and increase every day. In describing the nature of the alterations, the colour of the ink in which they were made, resembling that in the body of the will is written, and other intrinsic appearances upon the face of the will:] In the memorandum made by the deceased, it is evident there had been erasures in the will made by her. I think, from the writing and colour of the ink, that the alterations were made at the time when the body of the will was completed. But she says nothing of the words in the margin, and the Court would have had difficulty in coming to a conclusion as to this portion of the will if the case had rested here. But it appears that in February, 1845, she made a codicil, with reference to the alterations in the will, which codicil is duly attested. In the codicil, she says the alterations were made in the will before the execution of the codicil, the codicil republished the will. The deceased did not die till July, 1846; and, looking at the internal evidence in the will, the Court may conclude that the alterations were

FEB. 23. made before the execution of the codicil. I might conjecture that they were made before the execution of the will itself; but I am satisfied that they were made by the deceased at least before the execution of the codicil, and the codicil republished the will. Therefore, I decree probate of the will and codicil as they stand.

Bradley, dec.

Probate as altered.

Thomas, Proctor.

Where the name of an executor had been erased in a will, after execution, and that of another person written by the testator upon the erasure, the Court held it to be a case of absolute revocation, not of substitution, refusing, upon parol evidence, to grant probate of the will as it originally stood, and required the consent or renunciation of the party whose name had been erased, before granting probate in blank to the other executors.

MOTION.

IN THE GOODS OF JOHN BEDFORD, DEC.—*Motion, ex parte.*—The deceased died 2nd December, 1846, having made his will, bearing date 12th October, 1840, and which was duly attested by two witnesses, though the attestation-clause is defective. In the appointment of executors (of whom there were three, including the widow), the name and description, "Joseph Gillott, of Graham Street, steel-plate manufacturer," were written, in the deceased's handwriting, upon an erasure, so complete as to render it impossible to make out from the will itself what had been originally written there. The writer of the will (who is also one of the subscribed witnesses) deposed that, when it was executed, the name and description, "Joseph Chirm, of Holland Street, pump-maker," in the witness's handwriting, appeared where the erasure now is, such name and description having been inserted by him agreeably to the instructions of the deceased, who did not inform him that he had inserted Gillott's name.

R. Phillimore, Dr., moved for probate of the will as it originally stood, admitting, however, that the case fell under the rule laid down in the case of *Townley v. Watson*,* and therefore, the probate should go out with the part written upon an erasure in blank. [PER CURIAM.—Cannot a case of substitution be supported by parol evidence?] I apprehend not such a case as this.

DECREE.

SIR H. JENNER FUST.—The gentleman, whose name is said to have originally appeared as executor, should re-

* 3 Notes of Ca. 17. 3 Curt. 761.

nee, so far as by law he may, or consent to probate to other executors. If he does so, probate may then be noted. I cannot grant the motion for probate as the will finally stood, for the revocation is complete. This case is different from that of *Brooke v. Kent*,* which related to substitution of a legacy; it was a question of intention, therefore evidence was received *aliunde*. Here the relation was absolute, not depending upon the valid substitution of the name of Mr. Gillott as executor, and therefore the Court cannot admit parol evidence. Mr. Chirm have notice, and either consent to probate to the widow or the other executor, or renounce so far as by law he may. When that is done, the Court may decree probate to the two persons, the widow and Mr. Turner.

Mr. Chirm, the person originally named executor, renounced, and probate was granted to the widow and Mr. Turner.)

Thomas, Proctor.

Feb. 23.
Bedford, dec.

Probate in blank.

A similar case occurred on the same day, "*In the goods of Thomas Moore*," in which the same course was followed.

THE GOODS OF CLEMENT JOSEPH PHILIP PENN Where all the
ON DE BODE, DEC.—*Motion, ex-parte*.—The deceased, testamentary
son of the Holy Roman Empire, formerly a colonel and papers of the
of a regiment of Lancers in the imperial service of deceased, dated
late of St. John's Wood, Middlesex, died suddenly before 1838,
October, 1846, having made and duly executed his will after his death
three codicils, and, without appointing any executor, to have had
his son, Clement Augustus Gregory Peter, the pre- his signature
son de Bode, residuary legatee. The will, which is struck through
in pencil, and first codicil, bear date 24th January, with a pen and
and are, in the deceased's handwriting, upon one ink, and no po-
of paper; there is also a memorandum, dated 14th sitive evidence
1837, written by the deceased, on the same sheet could be ob-
Court, upon tained as to
evidence that when this was
done; the

* 1 Notes of Ca. 93. 3 Moo. P. C. C. 334.

FEB. 23. of paper. The second and third codicils are written on another sheet of paper, and are dated 22nd September, 1836, on which sheet of paper a memorandum, dated 16th March, 1837, is written by the deceased. The will and codicils were, after the deceased's death, found locked up in a tin box, in the library of his dwelling-house, inclosed in an envelope, the seals of which were broken. At the time of finding them, all the signatures, "De Bode," to the will, codicils, and memoranda were observed to be struck through with a pen and ink, and no positive evidence could be obtained as to the period when this was done; although, from the deceased's expressed intentions of making other dispositions of his property, and from the circumstance of the papers being found with other papers of consequence, it was presumed that the date must have been recent. The memorandum of 14th April, 1837, exhibited alterations, with a note in the handwriting of the deceased, stating that he had made them that day. A proxy had been executed by all the parties interested in an intestacy, consenting to a *grant* of administration with will and codicils annexed to the same and residuary legatee.

FEB. 13.
MOTION.

Adams, Dr., moved accordingly.—The papers are remarkable in their form and appearance. The only circumstance, however, which gives rise to any question is the striking out the signatures of the deceased. From the lapse of time, and from the circumstance that two of the papers bear date only a few months before January, 1838, the Court may presume that the signatures were struck out after the Wills Act came into operation. There is no probability that he was without a will from before 1838 till his death. His solicitor states that the deceased said, long after 1836, "he was going to make a will," and it is probable that he struck through his signatures about that time.

SIR H. JENNER FUST.—The question is, whether there has been a cancellation and revocation of these papers which were originally signed by the deceased. They are all dated before 1st January, 1838, and I think, upon the face of them, *primâ facie*, this would amount to a cancellation, *animo revocandi*, before 1838. The question, therefore, is,

at what time was the act done? If before 1838, *prima facie* it is a cancellation, *animo revocandi*; if after 1838, another question arises, for it has never yet been determined, whether, where a will is dated before 1838, the cancellation of it after 1838, by the signature being struck through, requires the attestation of witnesses. The Act is not to extend to wills executed before 1838, though it is held that no partial alteration made in such a will after 1838 can have effect, unless it be properly attested. My present impression is, that it would come under the same rule as alterations in a will executed before 1838, made after that date. If the cancellation was made before 1838, I should hold that it had been done *animo revocandi*, and that the papers were revoked. Under the present Act, cancellation will not do, as cancellation is not one of the modes of revocation prescribed by it. Up to April, 1837, it is clear that the deceased considered this to be his will, and that he made alterations so late as April, 1837. The Court has no direct information at what time the alterations were made, but it has evidence that, at a late period of his life, the deceased meditated making a new will, and I am inclined to hold that the signatures were not struck through till after 1838. The difficulty I have is, whether I should, upon motion, dispose of the question as to the effect of cancellation after 1838 of a will made before that date.

(The case stood over.)

Addams renewed the motion.—The Court is satisfied that Feb. 23. the signatures were struck through subsequent to 1838, and the only question is, as to the effect of such an act. There is a case* in which a gentleman, intending to revoke his will, erased every legacy in the will, and the Court was of opinion that this did not amount to a revocation. Now, striking out every legacy and striking out the signature come to the same thing; and, therefore, I contend that the deceased's striking out his name, if done after 1838, does not amount to a revocation, it being apparent, moreover, that he intended to make a new will, and until he had made

* *Stephens v. Taprell*, 2 Curt. 458.

FEB. 23. the new will, he could not intend to get rid of the old one.
De Bode, dec. [PER CURIAM.—Suppose the date of the will had been after 1838, would it be a sufficient revocation?] Clearly not.

DECREE. **SIR H. JENNER FUST.**—Striking out the name is not the same act as striking out every legacy in the will. The question would be *quo animo*? I agree with you that his intention was to make a new disposition of his property, and this was a preliminary step, and I think the Court is at liberty to decree probate of the papers on the evidence before it. The step was preparatory to the making a new will, and was not meant to be final and effectual until the new will was made. The question, whether such an act, done after January, 1838, to a will dated before, amounts to a revocation, provided it be done *animo revocandi*, hardly arises in this case. I think, under all the circumstances, that the act was preparatory to the execution of a new will, and as all parties consent, the Court will act upon that consent without requiring the papers to be propounded. **De Bode.** [The Registrar.—Are the signatures to be restored?] Yes.

Administra-
tion decreed.

Toher, Proctor.

Consistory Court of London.

Bye-Day.

FEBRUARY 26.

A Faculty **HAMILTON AND OTHERS v. THE PARISHIONERS AND**
 for the taking **INHABITANTS OF THE PARISH OF LOUGHTON, IN ESSEX,**
 down a parish **IN SPECIAL, AND ALL OTHERS IN GENERAL.—MOTION—**
 church, in a **This was a cause or business of citing the parishioners and**
 parish trans-
 ferred, under **inhabitants of the parish of Loughton, in the county of**
 the Act 6 & 7

Essex, and all others interested, to shew cause why a License or Faculty should not be granted, under seal of this Court, to the Rector and churchwardens of the parish, for taking down the ancient parish church of St. Nicholas and appropriating the materials, with the furniture and fittings, or the proceeds of their sale, towards the erecting, fitting up, and completing the new parish church of St. John the Baptist, in the said parish, in pursuance of the resolution of a meeting of the parishioners in vestry; promoted by the Ven. Anthony Hamilton, Archdeacon of Taunton, the Rector, and the churchwardens of the parish.

Feb. 26.

*Hamilton v.
Parishioners of
Loughton.*

Will. 4, c. 77,
from the dio-
cese of London
to that of Ro-
chester, held to
be issuable by
the Court of
London, not
that of Roches-
ter.

A Proctor appeared for the Promoters, and alleged that the ancient parish church being inconveniently situated, and the accommodation therein being very insufficient, a meeting of the parishioners in vestry was duly convened for the purpose of considering the propriety of erecting a new church, at which meeting, held on the 2nd July, 1844, it was resolved to erect a new church, to be substituted for the ancient parish church, and that the churchwardens should be empowered to apply for a Faculty for the purpose; that, in pursuance of such resolution, a new church had been erected, which, on the 4th November, 1846, was duly consecrated by the Bishop of Rochester, and by an instrument under the seal of the Commissioners for Building New Churches, dated 4th December, 1846, the new church of St. John the Baptist was substituted for the ancient parish church of St. Nicholas, and the endowments and emoluments belonging to the ancient church were transferred to the new church; that the Bishop of Rochester had consented to the taking down of the ancient church, and that one of the promoters was patron of the Rectory. A Decree accordingly issued, citing the parishioners and all others interested to appear and shew cause why a Faculty should not be granted, with the usual intimation. The Decree was duly served and returned, and no appearance being given,

Feb. 13.

Feb. 17.

Phillimore, Dr., moved the Court to decree a License or Faculty pursuant to the intimation contained in the Decree.

MOTION.

Dr. LUSHINGTON. — This is apparently a very incon-
VOL. V. 2 C JUDGMENT.

FEB. 26. *Hamilton v. Parishioners of Loughton.* sistent proceeding, for it is an application for a Faculty to take down a parish church, 'situated in] the diocese of Rochester, with the consent of the Bishop of Rochester and the Faculty is to issue out from the Consistory Court of London. I have, of course, had an opportunity of considering this question, and without going into any detail to the provisions of the Act of Parliament* transferring certain parishes from the diocese of London to that of Rochester, it is sufficient to say that there is a provision in the Act that the taking away of such parishes should not interfere with the jurisdiction of the Ecclesiastical Courts of the dioceses. If the Faculty in this case were to issue from the Court of Rochester, it would be an intrenchment upon the jurisdiction of the Consistory Court of London, and the test is this; that the object of the Act was to provide that vested interests should not be disturbed, and if there was any disturbance of vested interests, the intention of the Act would not be carried out. If the jurisdiction were exercised by the Court of Rochester, and not by the Court of London, there are persons whose interests would suffer detriment, and that would be a violation of the Act of Parliament. although there is some degree of contrariety and repugnance in the proceeding, yet I think it is the best course in the circumstances to proceed.

Motion
granted.

(Faculty decreed.)

Bedford, Proctor.

Archbishop of Canterbury.

Add. Court Day.

MARCH 2.

Suit for restitution of conjugal rights, by the husband. **THE COUNTESS OF DYSART v. THE EARL OF DYSART.** — *Appeal.* — *Cause.* — This was an appeal from the Consistory Court of London, where it was a suit for restitution

* 6 & 7 Wm. 4, c. 77.

† Sect. 20; continued by subsequent Acts.

rights promoted by the Earl of Dysart against the wife, on whose part it was answered by a plea charged against her husband, upon which she had a prayer for a divorce. A counter Allegation by the Earl accused the Countess of provoking, irritating, and abusive conduct. The sentence of the Court below was that Lady Dysart had failed in establishing her case; she was accordingly refused her prayer for a divorce, and in favour of the prayer of Lord Dysart for restitution from this sentence an appeal was prosecuted to this Court on the part of Lady Dysart.

The case was argued in Hilary Term, 1846, by the same counsel as in the Court below, who took the same line of argument.

H. JENNER FUST (after detailing the nature of the proceedings).—In this case, independently of the rank and station of the parties, there are many peculiarities, which render it not only a most painful subject to discuss, but one of considerable difficulty. The facts pleaded in the cause occurred more than twenty years before the time when the witnesses were called, for the marriage took place so far back as September 1819, and the proceedings in the Consistory Court did not commence till 1842, and many of the depositions deposed to by the witnesses took place in 1821.

But the difficulty which arises from this cause, is not the great lapse of time which has intervened, is not why the Court should refuse to proceed to the consideration of the case, and form its judgment, as well as it is in the means afforded it of coming to a right con-

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band against the wife, not sustained; met by a charge of cruelty against the husband, sustained, and a separation pronounced for at the prayer of the wife: reversing the sentence of the Court below.— Doctrine and definition of legal cruelty examined. — To what extent and under what limitations it is the duty of a wife to submit to the commands of her husband and conform to his tastes and habits, and at what point she may resist or remonstrate.— What is illegal violence on the part of the husband.

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former observation which occurs at the outset of the case, that a long interval occurs between many of the depositions pleaded upon one side and the other, which is explained by the length of time during which the parties have been living separate and apart from each other, extend-

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* 3 Notes of Ca. 324. 1 Robert. 106.

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ing over several years, the Earl residing in Leicestershire and Lincolnshire, and the Countess living with her parents in London; and although there were visits and matrimonial cohabitation between the parties at the house of Lady Dysart's parents, this by no means relieves the Court from the embarrassment to which such a state of things gives rise. Another difficulty arises from the manner in which the parties lived; from which cause but few witnesses could be produced to support the case set up by Lady Dysart. The parties lived almost in a state of seclusion from the time when Lady Dysart quitted her father's roof, in 1828, to go to reside with the Earl at Edmonthorpe, in Leicestershire. It does not appear that, whilst residing there, they paid or received any visits, or were in the habit of seeing or associating with families in the neighbourhood, and the only persons, therefore, who were capable of speaking to the terms upon which they lived are the servants and attendants upon one and the other of the parties; and these persons are of that description of witnesses usually found to take a strong bias in favour of the party on whose behalf they are examined. The witnesses on behalf of Lady Dysart are persons who were attending upon her; but, in saying this, the Court does not mean to infer that, in this particular case, they have suffered themselves to be led away from the truth by their feelings or partiality for Lady Dysart, to give exaggerated or inflamed accounts of facts of which they state themselves to have been eye-witnesses; but the observation is made to shew the necessity, in this case, as in all similar cases, of examining the evidence of persons so situated with great care and caution. And the observation does not apply to one party more than the other,—to the witnesses produced by Lady Dysart more than to those examined by Lord Dysart. With a few exceptions, the witnesses produced by Lord Dysart are of a description of persons falling under the same category, being his under-bailiff or land steward, and servants, and persons dependent upon him, and who may be presumed to depose under as much bias as Lady Dysart's witnesses in favour of the party upon whom they depend: so that, on

ne side and on the other, the Court is bound to exercise the greatest caution and vigilance, to prevent itself from giving too great a degree of credit to these witnesses, when leposing in favour of either party, particularly on points where they differ from each other in their representations of acts which occurred in the presence of witnesses of both descriptions.

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The marriage of the parties, as I have said, took place in September, 1819, and was followed by the birth of a son in July, 1820; during which interval, and for some months afterwards, until December, 1820, the residence of the Earl and Countess (at least, that of the Countess, and that of the Earl for some time) was under the roof of the father of Lady Dysart. It appears that, shortly after the birth of the son, at the end of 1820, the parties occupied a house at Edmonthorpe, in Leicestershire, and they remained there until the beginning of April, 1821, when, the term for which the house was taken having expired, they quitted Edmonthorpe, Lady Dysart going to her father's house, where she remained until January, 1822, when she joined her husband at Irnham, in the same county. She continued here until the August following, when she again went to her father's. The Earl, after quitting Irnham, went to live at a cottage at Corby Heath, where he continued to reside until 1826. In 1825, the Countess had gone to Buckminster, a Lincolnshire, a mansion belonging to the Earl's father, at so great distance from Corby Heath. There was no cohabitation at Corby Heath; the Earl lived there secluded by himself. From July, 1826, to the spring of 1827, the Earl and Countess resided together at Buckminster, when the latter again left Buckminster, and resumed her residence at her father's house, in Mortimer Street, Cavendish Square; and from that time until 1834 (a period of seven years) the parties resided separate and apart from each other. During that time, Lady Dysart was occasionally visited by the Earl, who, upon some of those occasions, passed the night with her, and for a short period, in September and October, 1834, the parties cohabited together at a house in Hyde Park Place, which had belonged to the Earl's father,

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who died in March, 1833. But that cohabitation did not continue for more than a few nights, and during the period from 1834 till the summer of 1836, the Countess resided with her father. In the summer of 1836, she again took up her residence at Buckminster with her husband, and continued to reside there until April, 1837, when she finally quitted her husband's house, and has never since resided with him or had any personal communication with him.

Such is the manner in which the matrimonial cohabitation of these parties was carried on, the result being that, during eighteen years, they did not reside together in any house of the Earl for much more than three years, not taking into account the time when he occasionally visited her, during that period, at her father's house: their cohabitation together, under their own separate establishment, did not exceed, during these eighteen years, a period of more than three years, and this with long intervals occurring in the years I have mentioned. With whom the fault of these long separations lay has been made a question in the Argument, both in this Court and the Court below. The learned Counsel for the Earl of Dysart attributed the whole blame to the Countess, whose duty, they said, it was to have conformed, and persevered in conforming, to the wishes of her husband, under almost any circumstances. On the other hand, it was argued and insisted upon, that the conduct and manner of life, and the extraordinary habits, of the Earl, and the ill-treatment which Lady Dysart experienced from him, made it impossible for her to perform her conjugal duties without danger to her person or to her health. And this is really the question which the Court is called upon to determine; for there is no dispute as to the general duties of the married life, on the part both of the husband and the wife, and there can be no doubt that, generally speaking, it is the duty of the wife to conform to the habits and tastes of her husband. At the same time, it is as fully admitted, and must be admitted, that this general rule must have its limitations and qualifications, and must be understood only as applying to cases where those habits lead not to actual ill-treatment of the wife, or to a rational apprehension of it,

they do not tend to endanger her life or health. It is not in dispute between the learned Counsel, at its general effect; but they differ as to its application to the peculiar and very extraordinary features of

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given this short sketch of the case, it may be proper for the Court should refer to the principles of law which have been laid down and acted upon for many years, to form the law and the doctrine of these Courts in cases of this description.

Difficulty in all these cases has been to give a general statement of the law as applied to cases of cruelty. Many cases have occurred in which the law has been laid down, on a general principle, but with reference to the particular circumstances of the case to which the law was to be applied, and, for the purpose of stating the principle upon which the Court considers that this case, under its peculiar circumstances, ought to be decided, it will be right and proper for the Court to examine, with some degree of minuteness, the principles laid down in some of those cases, and the manner in which the doctrine of legal cruelty has been applied in these Courts. Those cases have been always referred to for the purpose of establishing the principles; but the decisions, indeed most of them, must be considered with reference to the peculiar circumstances of the case under discussion. General principles are laid down in all the cases; those general principles are applied to the particular circumstances of each, and the Court now refers to those cases for the purpose of considering the application of general principles to the individual subject of inquiry, and in what degree they are applicable to the particular circumstances of this case. The present case, as I have said, is distinguished by features of great peculiarity. I have endeavoured to select those cases which have a direct bearing upon many, if not all, the points which have been raised in this case, and argued by learned Counsel on both sides.

Law applicable to the case.

The case, to which we are in the habit of referring for principles applicable to cases of cruelty, is that of *Cases furnishing the principles.*

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Evans v. Evans,* in which Lord Stowell lays down the general principles of the law applicable to cases of cruelty. He says, it is difficult to give a definition of what is legal cruelty; that it is easier to define what is not cruelty; but that, in general, every thing which affects the life, the health, or the safety of the party, no doubt comes within the strictest definition of legal cruelty. He says:—

It is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger, no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of "*per quod consortium amittitur*" is but an inadequate test; for it still remains to be inquired, what conduct ought to produce that effect; whether the *consortium* is reasonably lost, and whether the party quitting has not too hastily abandoned the *consortium*? What merely wounds the mental feelings is in no cases to be admitted, where unaccompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulant manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty The suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance, or by prudent conciliation; and if this cannot be done, both must suffer in silence.

This learned judge, with reference to the general principles of the law, as applied to that particular case, *has* states what is *not* cruelty; that occasional sallies of passion "if they do not threaten bodily harm;" and what *merely* wounds the mental feelings, "where unaccompanied with bodily injury, either actual or menaced," do not amount to legal cruelty; implying that, if they do menace bodily harm, these acts do amount to legal cruelty. He goes on:—

Still less is it cruelty where it wounds not the natural feelings,

* 1 Hagg. C. R. 35.

the acquired feelings, arising from particular rank and situation; for the Court has no scale of sensibilities, by which it can gauge the *quantum* of injury done and felt; and therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated merely as matter of aggravation; yet they do not constitute cruelty, where it would not otherwise have existed: of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessities, is not cruelty.... These are negative descriptions of cruelty; they shew only what is *not* cruelty, and are, perhaps, the safest definitions which can be given, under the wide variety of possible cases that may come before the Court. If it were at all necessary to lay down an affirmative rule, I think that the rule cited by Dr. Bever from Clarke and the best books of practice is a good general outline of the Canon law, the law of this country, upon this subject. In the older cases of this suit, which I have had an opportunity of looking into, have observed that the danger of life, limb, or health, is usually asserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court, in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the convenience of departing from it, and I have heard no one case cited, in which the Court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*: it must be an apprehension arising merely from an exquisite and increased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine; but still they are not cases of legal relief.

Here, so far as it was prudent to lay down an affirmative definition, the learned Judge does lay down, that there must be a "reasonable apprehension" of bodily hurt; that the Court "is not to wait till the act is done;" but that a *reasonable* apprehension must exist, and the reasonableness of the apprehension the Court must infer from the circumstances of the case.

This doctrine is laid down not only in the case I have just referred to, but to the same effect in that of *Oliver v. Oliver*,*

* 1 Hagg. C. R. 361.

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which was a suit for restitution of conjugal rights by the husband, against which the wife pleaded his cruelty, founding thereon a prayer for a divorce, the charges of cruelty consisting partly of words of abuse and reproach, and partly of acts of a harsh and oppressive nature. Lord Stowell says:—

Of words, it is sufficient to say, that if they are words of men present irritation, however reproachful, they will not enable the Court to pronounce a sentence of separation. She (the wife) must try to disarm them by the weapons of civility and kindness; and if they fail (as unfortunately they often will), the law of this country requires that she should submit to the misfortune, as one of the consequences of her own injudicious choice. Passionate words do not, according to the vulgar observation, break bones, and it is better that they should be borne with than that domestic society should be broken up, and a husband and a wife thrown, in *low* characters, upon the world. Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done.

Again, in *Holden v. Holden*,* speaking of acts of violence by the husband during a quarrel between the parties, Lord Stowell says:—"Whatever the origin or occasion of the quarrel may have been, there is nothing to shew that it proceeded from the wife; and there is enough to satisfy the Court that very unlawful violence was used upon the wife, from which she has an undoubted right to be protected." The Court is in such cases bound to interfere for the protection of the wife. In all these cases, it may be difficult to ascertain what was the origin of the quarrel between the parties, and the Court must satisfy itself as far as it can, from the habits, and general tone and temper of the parties, what was the cause from whence the quarrel proceeded. In that case also Lord Stowell laid it down, in his definition of cruelty, that "Every thing is, in legal construction, *savûia*, which tends to bodily harm, and, in that *manner*, renders cohabitation unsafe." And with reference to that

* 1 Hagg. C. R. 453.

in case, he says that, " whenever there is a tendency to bodily mischief, it is a peril from which the wife is protected." In that case, the wife was found lying on the floor, the husband standing over her, having hold of her, " as if he would break them from off her shoulders, and they were very much bruised ; and though it did not appear what was the origin of the quarrel, there being nothing to shew that it proceeded from the wife, and the husband said she had an undoubted right to be protected. The Court well further says :—

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Wherever there is a tendency only to bodily mischief, it is a case in which the wife must be protected ; because it is unsafe for her to continue in the discharge of her conjugal duties ; and because that obligation upon her might endanger her security, and even her life. It is not necessary, in determining this, to inquire from what motive such treatment proceeds. It may proceed from turbulent passion, or sometimes from causes which are inconsistent with affection, and are indeed often connected with the passion of jealousy. If bitter waters are flowing, it is necessary to inquire from what source they spring. If the conduct of the husband are so much out of his own control, as to be inconsistent with the personal safety of the wife to continue in society, it is immaterial from what provocation such treatment originated.

In the case of *Holden v. Holden*, he lays down another principle, which may apply to the circumstances of this and other cases, namely, that a great number of acts is not sufficient to support a charge of cruelty.

The law does not require that there should be many acts. The Court has expressed an indisposition to interfere on account of one act, particularly between persons who have been under long acquaintance ; because, if only one such instance of ill-treatment, of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this condition that the Court forbears to interpose its protection, even in the case of a single act ; because, if one act should be of that nature which should induce the Court to think that it is likely to be repeated, and to occur with real suffering, there is no rule which would restrain it from considering that to be fully sufficient to justify its interference.

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Again; he lays down a rule, which is applicable to the present case, with respect to the conduct of the wife, which is said to have been provoking, and irritating, and abusive, and leading to the violence for which she now seeks a remedy at the hands of the Court:—"It is not necessary that the conduct of the wife should be entirely without blame; for the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband."

Again; in the case of *Harris v. Harris*,* Lord Stowell said:—"There must be something which renders cohabitation unsafe, or is likely to be attended with injury to the person or to the health of the party, in order to sustain an application to this Court."

With reference to a point to which I have already alluded, namely, the provocation given by the wife, in the case of *Best v. Best*,† in the Consistorial Court of Rochester,—which was a suit by the wife for a separation by reason of the cruelty of her husband,—Dr. Swabey said:—

It has been repeatedly laid down in these Courts that no wife can solicit their interference with effect, to protect her even from ill-treatment, which she has drawn upon herself by her own conduct: she must first at least seek a remedy in the reform of her own manners. If, however, it should appear that even such conduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such the wife's positive conduct.

(After referring to the cases of *Westmeath v. Westmeath*,‡ *Durant v. Durant*,§ and *D'Aguilar v. D'Aguilar*.||)

These, therefore, are the principles by which the Court is to be guided in its application of the law to the circumstances of the case before it. I am to consider whether there has been what is considered to be actual cruelty in the eye of the law, or an apprehension of bodily harm arising from the conduct of the husband, and whether that appre-

* 2 Hagg. C. R. 148.

† 1 Add. 411.

‡ 2 Hagg. E. R. 61.

§ 1 Hagg. E. R. 733.

|| *Ibid.* 773.

mission is a reasonable one, which would be sufficient to entitle the wife to the protection of the Court; and we are to remember that, if the conduct of the husband has tended to the bodily harm or injury of the wife, it is not necessary that the wife's conduct should have been entirely free from blame; that, if it be proved that, to a certain extent, the wife had given some provocation to the husband, if the return on his part was quite out of proportion to the fence, it is still the duty of the Court, according to Dr. Wabey, in *Best v. Best*,—as with reference to the facts of the particular case, at least,—judicially to interfere for the wife's protection.

The Court will now proceed to consider the state and condition of the parties in this case at the time of their marriage and during their cohabitation. It seems that the Earl and Countess were the children of two sisters, and consequently first cousins, one sister (the mother of the Earl) having married Lord Huntingtower, the other (the mother of Lady Dysart) Colonel Toone. The father of Lord Dysart was possessed of very large estates in different counties of England, producing a very large income, and these estates were entailed upon his eldest son, the present Earl of Dysart, who, however, during his father's life, was entirely dependent upon him. The marriage of his son with Miss Toone was contrary to the expressed opinion and wishes of Lord Huntingtower, and when it was contracted, he refused to make his son any allowance whatever, and in consequence of such refusal, the Earl (then Mr. Manners) purchased an annuity of £3,000 during the joint lives of himself and his father, and an annuity of £1,000 for his wife, should she survive him. The purchase-money of these annuities amounted to £110,000, which was payable on the death of Lord Huntingtower, if he should die in the lifetime of his son. This was the amount of the annual income on which he and his wife were to be maintained,—an income, it must be admitted, not large enough to permit the indulgence in expensive luxuries, but amply sufficient to enable them to live in comfort and respectability. At that time, there was no necessity, with an income of this description, for depriving

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themselves of the necessaries, or comforts, or even many of the conveniences, of life. That this income was originally intended to be so applied, no reasonable doubt can be entertained, for it cannot be supposed that the annuity thus purchased was to be used as a sinking-fund for the redemption of the principal sunk in the purchase. It is true, indeed, Lord Dysart may, upon consideration, have become alarmed at the large amount for which he had become responsible, and, under that feeling, may have resolved to abridge himself of all luxuries, and to confine his expenditure within the narrowest limits possible; at all events, whatever may have been his motive, this mode of living he adopted, and he expected that the same principle and the same system should be adopted by his wife.

It has been said, in the Argument, that the habits and tastes of Lord Dysart must have been known to his wife before their marriage to be in some degree peculiar and eccentric, and that she ought, therefore, to have made up her mind, before she entered into the married state, to conform to them; and this may be in some degree true. But, to judge from the style in which the Earl lived before his marriage, there was no reason to suppose that his system of economy would have been carried to such an extent as that of curtailing to himself and his wife the comforts, or necessaries, or even the conveniences of life. There was no reason to suppose this from the account given of the Earl's tastes and habits before marriage, for it appears from the evidence of Jabez Dickens, one of the Earl's own witnesses, that, before his marriage, he lived in great style, keeping sixteen horses, sixty dogs, and a proportionate establishment of servants. It is true, indeed, that it was not at his own expense, but at the expense of his father, that these luxuries were enjoyed; but there is nothing to shew that that style of life was not in accordance with his taste, and, therefore, there was no reason to suppose that such different tastes and habits would have been adopted when he had an income of £3,000 a year, which was sufficient to have enabled him to live with some degree of comfort, and to command not the mere ne-

cessaries, but the conveniences of life, and Lady Dysart never could have been led to suppose that she would have been subjected to a system of economy,—something beyond economy,—which deprived her of the comforts she had been accustomed to. She had been brought up in a station of life in which she had necessarily imbibed tastes and habits opposed to those subsequently adopted by her husband; but there is no reasonable ground for believing (as suggested in the Argument and in the pleadings) that she was anxious to have more of the comforts and conveniences of life than was suitable to the rank and station and fortune of her husband, or that she desired to indulge in what has been termed the pleasures of a London life. Though she might have preferred to live in London, rather than in Leicestershire, there is no evidence to shew that she was led to this preference by any desire to indulge in the gaieties of a London life.

There is no reason to suppose, as far as the Court can judge, that this marriage was not one of mutual affection. It has been said that the Earl would have refused to marry his cousin unless she had promised to conform to all his tastes and habits. But Mr. Frederick Tollemache, the brother of the Earl, says he believes that the union was one of sincere affection on his part; and looking at the tenour and tone of the letters addressed to Lady Dysart by the Earl before the marriage, and to her mother shortly after, there is no reason to believe that there was any want of affection on his side.

As to the manner in which the parties lived together, between the date of their marriage and the birth of their son, there is very little information before the Court. Unfortunately, at the birth of their son, in July, 1820, it appears that a circumstance occurred which seems to have given great offence to the Earl, who was in the room at the time when the Countess was confined. It appears that Lady Dysart had urged and entreated her husband to be present with her on that trying occasion, and that he complied with her request; but Dr. Batty, who attended her, requested Lord Dysart to withdraw for a short time, which he refused to do unless his wife desired it, and, at the request of Dr.

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Batty, she did so, and the Earl quitted the room, but in such a manner as to shew that he was seriously offended with his wife. Now his conduct on this occasion has been characterized as an act of cruelty; but I think it cannot be so considered. It was not done with any premeditated intention to hurt her feelings, or to increase the anguish of the moment; the request to withdraw came upon him unexpectedly, and, as he thought, under all the circumstances, unnecessarily, and he acted upon the sudden impression that it was a mark of indifference towards him: and therefore I dismiss this incident, so far as it can be urged against the Earl as an act of cruelty. But it has another bearing, which entitles it to considerable weight, for it shews that, at this time, the Earl's affection for his wife suffered a very material diminution. It is impossible to read his letter, dated the 26th September, 1820, without arriving at that conclusion. Indeed, the Earl himself avows, without scruple, in that letter, the estrangement of his affections, and attributes the change in his feelings to her conduct at the birth of the child, as shewing indifference towards him, and to other instances in which she had refused to comply with his wishes. He says:—

I candidly acknowledge to you, Eliza, that I have not felt the affection I used to feel for you since your confinement. The indifference you evinced towards me at that trying hour tended a little to banish affection from my breast. You ask me when I shall return to you? I answer, when you can prove to me that you really and sincerely wish it, which you have not yet done; neither will you convince me by any such ways as writing to me for four days running, or four years daily. When I am present, not even in one instance have you endeavoured to prove to me you wish to please me. No; but you have convinced me that you wish to please the world; for whatever the world seems to say you adopt immediately. You say your patience is long and well worked out. What do you mean by patience? When I see you again, I shall expect you to give me a full account of every visitor who has been at Keston; also every thing else relative to yourself.

Yours affectionately,

L. M.

Do you ever walk, and with whom do you walk?

e, then, is a clue to every thing which subsequently
 place ; here was an end of all that happiness which
 have been expected to attend the union between these
 t, and it was sufficiently manifest that, after this,
 ion to the comforts of his wife was the last thing that
 d Lord Dysart's thoughts. This is too clear to admit
 oubt ; the whole of his subsequent conduct furnishes
 of the unhappy change which at that time took place.
 much of the intermediate time between the birth of
 ild and their removal to Edmonthorpe was passed by
 rl in the society of his wife, does not appear ; but
 is no further charge of cruelty during that period, nor
 , indeed, to be expected that there would be at least
 ersonal ill-treatment of the wife whilst they were
 the roof of her father, and she had, no doubt, there
 undant supply of whatever was necessary for her, and
 tial to the re-establishment of her health and strength.
 t all this was to have an end on the 21st December,

for on that day she quitted her father's roof, and went
 ide with the Earl at Edmonthorpe. Here the scene
 ompletely changed ; the house was in a dilapidated
 the rooms were badly and insufficiently furnished ;
 rovisions, if not scantily supplied to Lady Dysart,
 such as she had not been accustomed to. But all this

to have been submitted to with resignation by a
 and if even the most common attention had been paid
 comforts and wishes, or the slightest degree of affec-
 displayed towards her, Lady Dysart must have endured
 privations, and the parties must have gone on residing
 er, without interference on the part of the Court.
 general marks of a want of affection towards a wife
 ot establish a case of legal cruelty against the husband,
 in the proper person to direct and control the expendi-
 of the establishment, and to take the management of it.
 Although no act of personal violence is proved to have
 committed, it is in evidence that the Earl was in the
 ant habit of swearing at his wife, and of abusing her.
 was deprived of all authority in the house and of all
 ol over the servants, the Earl keeping and delivering

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out and limiting the supply of all articles of necessary domestic consumption.

The witnesses produced to support the case of Lady Dysart, as to the conduct of the Earl during the time they were at Edmonthorpe, are two female servants, named Elizabeth Tanswell and Eleanor Woodley. The evidence of Tanswell is to this effect. She had lived with Lady Dysart, at her father's house, in 1813; and upon the 8th article of Lady Dysart's Allegation, she deposes to the manner in which the parties lived at Edmonthorpe in 1820. She describes the house as old, out of repair, and badly furnished. She says Lord Dysart did not behave at all well to his wife, or like a gentleman; that he was surly and passionate; she has heard him frequently say, "Damn you, madam!" He did not allow Lady Dysart enough of necessaries,—there was bread and butter, but no fish or poultry, and only occasionally a joint of meat was dressed. He scarcely allowed her any firing; he had cinders sifted and wetted to burn. He allowed her but one candle a night, "an eight dip tallow." He gave all out himself. On one occasion, when the weather was cold, Lady Dysart was in the dining-room, where there was scarcely any fire; she rang for coals, but the maid-servant was obliged to go for orders to Lord Dysart, and no coals came. Lord Dysart was then at dinner, dining upon a chest of drawers; Lady Dysart had had her bread and butter on a tray. The witness states that she has seen Lord Dysart in apparent passions with his wife, but never saw any violence towards her. The mode of living was unfit for any lady. Lord Dysart employed himself in the kennel and stable: he was no society to her, and she had none else. Upon interrogatory, she repeats that there was not a supply of common necessaries to Lady Dysart in respect of diet, food, firing, and candles. The parties never dined or breakfasted together. After the first fortnight, no dinner was prepared.

The other witness, Woodley, by no means differs from Tanswell as to any material facts. She went to Edmonthorpe about Christmas, 1820. Lord Dysart, she says, used his wife very badly. Their tempers were quite opposite: she

good enough, but he seemed to do every thing he could ; and irritate her. He was blustering, noisy, very , and violent. He denied his wife many comforts ; seemed to have none. The witness does not know that as denied a sufficient quantity of necessaries, such as case afforded. He generally took his meals by himself and slept away from her. She has heard him swear at her, though she cannot remember the particular expressions ; she can only depose to coarse, rough, unkind behaviour and treatment of his wife, to such a degree that as known her tremble at the sound of his foot on the

There may be some degree of exaggeration in this representation of the effect produced upon Lady Dysart. goes on to say that the Earl took charge of the household , the servants going to him for candles and coals, and look for what she wanted in the kitchen. His wife had authority in the house. The witness says she has heard from an adjoining room quarrelling with and aggravating her, till her (the witness's) flesh crawled almost, and she did not know how to bear herself. Upon interrogatory, she the Earl used insulting language towards his wife, and he was the aggressor. There is a fact pleaded to have place at Edmonthorpe, about his throwing a carving-knife at his wife ; but this is clearly disproved.

On the other hand, upon the articles of Lord Dysart's petition, as to the mode of living at Edmonthorpe, seven witnesses have been examined, and amongst them Wil-Pick, who describes the house as amply furnished, and that there was a good supply of every thing. Ann represents the house as not out of repair, and the house as quite furnished. She says she never knew of any discontent, though the parties seldom dined together. Dickenson states that the house was in good repair, but that there was no stint of provisions.

Under all these circumstances, it is to be considered whether there was not that degree of discomfort in the house which rendered it extremely difficult for Lady Dysart to live with her husband. I do not say that she would have been justified in leaving the house and her husband,

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but surely there was ground, and grievous ground, of complaint. She must have suffered injury both to her feelings and, in a certain degree, to her health. But still all this was to be borne, and if the grievance had been confined to the insufficient supply of those articles which she considered necessary to her; if he restricted himself (as he appears to have done) to unkind treatment and want of attention and affection towards his wife, she might complain, but she had no legal remedy, and was bound to submit to this treatment—at least to that extent—without redress from any Court of justice. But the treatment she received was only a sample of that which she experienced at other places of residence,—at Irnham and Buckminster. There was no attention on the part of the Earl to the wishes of his wife, no consideration of her habits, though she did conform to his habits, and sacrificed all her own feelings, tastes, and habits to his wishes and desires.

In April, 1821, they quitted the house at Edmonthorpe certainly under circumstances not importing legal cruelty, but shewing very little attention on the part of the Earl to the comfort of his wife. They left the house at twelve o'clock of a severe night; not a spark of fire was to be seen, or any smoke issuing from the chimney, after that hour, lest he should be saddled with the payment of rent, and she was compelled to walk in the cold to a neighbouring farm-house, where they were received with hospitality, and where they passed the night. It is not contended that this was an act of cruelty; undoubtedly it is not an act of cruelty. It shews an absence of affection, a great want of attention towards his wife, and the same disregard of her comforts as he had before manifested in his domestic arrangements. But still it is no act of cruelty, any more than any thing that had occurred at Edmonthorpe could be considered legal cruelty, that would entitle the wife to separation. But still it lays a ground of probability for what took place after they quitted this house.

The morning after, Lady Dysart quitted her husband, and took up her residence at her father's house in Mortimer Street, and there she remained until January, 1822. She

her husband at Irnham, and continued to reside till August.

Her account of the manner in which they lived at this time is deposed to by the witnesses produced by Lady Dysart, namely, Elizabeth and Marianne Holmes; and circumstances there which consist with what is stated to have taken place at Edmonthorpe, and some of them are of a more serious character.

She went into the service of Lady Dysart in May, and says the house was small, and not a fit residence for her; that Lady Dysart's room was not furnished fit for her ladyship slept on the floor, and her bed was up in the daytime. She says that Lord Dysart treated his lady in a very extraordinary manner; that he was violent in his temper; that Lady Dysart behaved more kindly to him, with more attention and respect than could have been expected. They set together. The witness does not remember any person being called at Irnham to visit the Countess, who she knows about her. She has known her to be without meat, tea and without wine. Of meat, bread, milk, and candles there was enough.

Her account of the general manner in which they lived at Irnham; and if the matter had rested here, there is no doubt that, although Lady Dysart may have experienced many privations, and was obliged to submit to her situation, she could have had no legal redress. It was her duty to submit; she might endeavour, as well as she could, by prudent remonstrance and persuasion, to wean him from the habits in which he at that time indulged; but if she was bound to submit as well as she could.

Two occurrences are spoken to as having taken place at Irnham which are of a more serious character, and ought to be more fully attended to. I refer to those added in the 13th article of the Allegation.

She deposes to her having heard, when above stairs, Lord Dysart's voice loud and passionate below stairs, as if he was angry; with and abusing Lady Dysart; that, being

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alarmed for her, she went down to the room-door, and found it fastened on the inside; that she knocked, and the door being opened by Lord Dysart, the witness saw Lady Dysart lying on the floor in a fainting fit. It is true, the witness saw no violence, and states that all passion had subsided; but she says "the violence which led to it I heard distinctly, and I remember the child, though so young (only between two and three years old), stamping his little foot in indignation against his father, and saying some words which I cannot undertake to remember." It is pleaded in the Libel that the child stamped, and said he would shoot his father when he was a man, "for striking his mother;" but the witness states merely that the child stamped with his foot, and said some words. To the conduct of the child towards his father, the Court is not called to pay much attention; but the stamping with his foot is admitted by Lord Dysart; though it is in evidence that the child, when any thing offended him, would stamp with his foot. This, therefore, is not a material circumstance. It is true the witness can not speak to the origin of the quarrel, or to an act of violence; but she heard the Earl's voice in a loud and passionate tone, quarrelling with and abusing his wife, the door being fastened, and when opened, Lady Dysart was in a fainting fit upon the floor; therefore she concludes that violence had been used towards her, but there is no proof that the fainting fit was the result of an act of violence. Certainly a quarrel had taken place, and there has been no attempt to impeach the general character of the witness, or to say that she has given an inflamed and exaggerated account of what took place on the occasion. At all events, it proves the violence to which Lord Dysart occasionally gave way.

But there is still another circumstance, pleaded in the 14th article, upon which this witness has been examined, and which is still more serious. On that occasion (in February, 1824), she says she heard Lord Dysart quarrelling with the Countess very much, in a loud tone of voice; she could not hear the words, but she could tell that he was in a violent passion; and she called to the Earl, who swore at her, and told her she might go out of the house; that she

a scuffling, and then Lady Dysart called out "mur-
two or three times; that Lord Dysart threatened, if
itness came up stairs to them, to throw her over the
ere; that she tried to persuade Mr. Felix Tollemache
Dysart's brother) to take a glass of sal volatile up
as she supposed Lady Dysart had fainted, and Lord
t, hearing this, called out that if he came he would
him the same; that Mr. Tollemache afterwards went
ie room, and Lady Dysart was brought down stairs by
and the Earl, "quite lifeless, apparently," and it was
time before she came to herself. Mr. Felix Tolle-
has not been examined on this part of the charge:
d in the course of the proceedings. But Mr. Frede-
Tollemache states that, at a subsequent time (in 1829),
allusion was made to the statement that his brother
heard the Earl call out that he would throw him over
ministers, Mr. Felix Tollemache denied that he had
any thing of the kind, and this is confirmed by a letter
him. This, however, is no evidence that the circum-
did not occur, nor have we the particulars of the
reaction between Mr. Frederick Tollemache and his
r. But it does not end here. On the 15th article,
itness Meginley deposes to Lady Dysart fainting more
through the night; to a medical attendant being sent
ho prescribed medicine, which she took, and to a lotion
sent for a bruise, which Lady Dysart said had been
oned by a kick or blow she had received from Lord
t in the lower part of her body.
re, therefore, is the fact of some bodily injury inflicted
Lady Dysart in some way or other, as she said, by a
given by her husband; and it appears that the learned
in the Court below entertained a doubt whether this
declaration made *recenti facto*. I have no doubt on
subject; I have no doubt that it was made *recenti facto*.
Collingwood, the medical attendant (who has since
was sent for the next morning; he came, and sent a
, which was applied, and this must have been in con-
see of Lady Dysart's complaining of a wound or some
injury, for which the lotion was prescribed and used;

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and the Court is bound to admit the declaration as evidence of the fact, borne out as it is by the circumstance that she had received a bodily injury, as she said, inflicted by her husband. It is admitted on all hands that a declaration *recenti facto* must be received, for there are no means by which a charge of cruelty against a husband, in such circumstances, could be made out, even where there is a *corpus delicti*, but the declaration of the wife to a witness, where the transaction has occurred between the parties themselves, no other person being present. If a wife is left with her husband, who inflicts violence upon her, no other person being present, there are no means by which the wife's case can be made out, if her declaration, made immediately after the transaction,—that is, on the first opportunity,—is not admitted as evidence. In this case there can be no doubt that an injury was received; that lotion was prescribed, and the declaration of the wife that she had received, immediately after it had been received. I have, therefore, no doubt that this is evidence of personal violence inflicted upon the wife,—personal violence shown by suffering for some time, and fainting during the night, and she continued ill for some time afterwards: a medical attendant was called in, who prescribed a lotion to be applied externally.

Part of this story of Meginley is confirmed, to that extent, by Marianne Holmes, who heard Lord Dysart threaten to throw her sister over the stairs. But she deposes to none of the other circumstances; and, as I said, Mr. Felt Tollemache has not been examined; it therefore depends entirely upon the credit to be given to Meginley. But I see no reason to doubt that the account she has given is correct and proper account. The immediate cause of the quarrel, according to the evidence of Holmes, was Lady Dysart's going up to her husband's room for the purpose of obtaining a rushlight, which she was in the habit of burning in her own room,—all about a rushlight. Lord Dysart says, in his Allegation (but of which there is no evidence) that it arose from his wife's endeavouring to force her way

to his room, and kicking at the door ; but there is no proof of this, and on the 28th interrogatory, Meginley states she heard a quarrel going on, but no violence, and he never heard Lady Dysart use scurrilous language towards the Earl, which is to a question addressed to her.

Now, supposing the case had turned upon this point ; supposing the parties had separated at this time, and a suit had been commenced by Lady Dysart, the Court very possibly would have considered that a single act of this description would have been hardly sufficient to justify a sentence of separation, supported by the evidence of only one witness, who did not see the act of violence, but who speaks to the effect of something having occurred during the time ; as she did not see the bruise, Lady Dysart herself being the only witness as to the wound and as to the cause of the injury. Still, however, it is a circumstance not to be left out of consideration by the Court, in looking at subsequent occurrences : all tend one way ; all tend to shew the probability of violence on the part of the husband.

On the 5th April in that year she again quitted her husband's house, and went to reside with her father ; and at the same time, or shortly after, Lord Dysart went to reside in a small cottage he had taken at Corby Heath, and there he remained until July, 1826. During this time Lady Dysart did not reside with him. No act of cruelty is stated to have taken place at that time, though it is pleaded in the libel that the Earl refused to go to see his child, who was dangerously ill at Buckminster ; and when the Countess, on one occasion, went to the cottage, to persuade him to leave it, he refused to admit her. These cannot be considered as acts of the nature of legal cruelty. I say nothing of the manner in which Lord Dysart is represented to have lived during the two years he was at Corby Heath ; but it is clear that it was impossible that Lady Dysart could have resided with him whilst he lived in so extraordinary a manner. He had only one servant, the man named William Pick, who performed all the offices, including those usually executed by females. He was the personal attendant upon Lord Dysart in his valet ; he was groom, cook, housemaid, and laundry-

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maid, and was the only person besides the Earl who resided in the house, where there was only one fire, and that in the kitchen. This was the miserable manner in which Lord Dysart thought proper to live, and it is hardly possible to expect that Lady Dysart could have gone there,—though Pick seems to have considered it a fit and proper residence for Lady Dysart; but Mr. Felix and Mr. Algernon Talmache both state that it was not a proper place for her to reside at. I pass over, therefore, the Earl's mode of living at Corby Heath; but it shews the inveteracy of his habits, and that there was the same discomfort at Edmonthorpe and Irnham, and Corby Heath, as afterwards at Buckminster, where he was joined by his wife in 1826.

In July of that year, Lady Dysart goes to live at Buckminster, as she pleads, and as I think it clear, in 1826, ~~as in~~ 1821, at the desire of Lord Dysart's family, which Lord Dysart denies (I have no doubt with perfect sincerity, ~~as he~~ had not any reason to believe it); but certain letters ~~are~~ annexed to the interrogatories, addressed to Lady ~~Dysart~~ by the family, which bear out her statement, that she ~~was~~ there not by her own wish, but at the desire of her ~~husband's~~ band's family, in order to induce the Earl to quit ~~Corby~~ Heath. These letters are annexed, as I said, to the ~~interrogatories~~ gatories and not to the plea, which is an inconvenient mode of bringing them before the Court; but still I do not ~~see~~ how Lady Dysart could have prevented it. She had ~~pleaded~~ that she had gone by desire of the family, and there might have been no necessity for the introduction of the ~~letters~~ the only object of which is to establish that fact. But the fact was denied, and witnesses were examined to ~~disprove~~ it, and she was compelled to produce the letters, which could not be introduced in a mutilated state; she was perfectly justified, therefore, in annexing the letters and applying them as a test of the sincerity of the brothers of Lord Dysart, who were examined in support of his plea.

The parties resided together at Buckminster until June 1827. Whilst there, the same course of living was pursued as at Edmonthorpe and Irnham. She was annoyed in ~~all~~ manner of ways, kept out of her bedroom until one or two

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5 o'clock in the morning; on some occasions her bedroom was locked up, and she was not suffered to go into it all night, and was obliged to sleep upon a sofa in the dressing-room. The Earl called her opprobrious names, and swore at her. A witness examined on this part of the case, Elizabeth Parker, then a housemaid in Lord Huntingtower's family, describes his mode of living very much in the same manner as other witnesses have described it. She says he used to lock his wife out of her bedroom until a late hour at night; that he used to swear at her, and call her opprobrious names, and on one occasion she screamed "murder!" Upon the 18th article she deposes that, upon another occasion, when the witness was sleeping in a room on the same floor with them, she heard a noise and scream from Lady Dysart, upon which she got up, and saw the Earl putting her out of the dressing-room door, and she passed the night in the nursery. The witness saw no further violence; she never saw the Earl pinch his wife, but has seen marks of pinching-bruises upon her arms and neck. Mary Gregory confirms this witness as to Lady Dysart being put out of her bedroom by the Earl in the early part of the night. It is said that Lady Dysart commenced the attack, and scratched Lord Dysart's face and struck his lip; but she says she saw no marks of violence upon Lord Dysart's person. Mr. Alphonse Tollemache, indeed, says that he has some slight recollection of seeing his brother's lip swollen, as if from a blow; but he has no knowledge of how it happened, though he slept in a room nearly adjoining that where the parties were. The witness Parker, though she saw no violence, yet saw marks of bruises or pinches, as if made by personal violence; but the Court is not at liberty to say that they were made by Lord Dysart; whatever may be the probability that they were so made, it cannot act upon such suppositions; it would be too much to say upon this evidence that the pinches or bruises were given by him. But still it shows the general manner in which the parties lived together, and the behaviour of Lord Dysart; and Parker deposes upon interrogatory that she never knew Lady Dysart abuse her husband.

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This, therefore, is the manner in which the parties stated to have lived during the period of their cohabitation under the same roof; and I think there is, upon the depositions, proof of a want of affection on the Lord Dyce's towards his wife, and a want of attention to her wishes and to her personal comfort and accommodation. But these hardships and privations will not found a separation, though they lay a probable ground of circumstances which subsequently occurred, and which have a material effect in the cause. Whatever injury may have been received from this treatment, there is nothing of a more decided character, as she could not found a separation upon the ground of any acts, whatever they be, up to the year 1827. Moreover, the parties have lived together since, and whatever may have been their views or motives, that was a condonation of all that passed, which can have no effect in the cause unless by later acts of cruelty.

This terminates the history of the parties up to 1827, as far as the oral testimony goes. From 1827 to the year 1833, there was no residence together under the same roof; there were occasional visits paid by Lord Dyce and his wife at the house of Colonel Toome, in London. No act of cruelty is alleged to have taken place during this interval, nor was it likely that any cruelty should have taken place in the house of the wife's father, where peculiar circumstances could have given rise to quarrels or violence on either side. But in 1834, there was a separation for a few days at Hyde Park Place. Lord Dyce's father died in 1833, and the son succeeded to his lands and estates, which produced a large income; so that at that time, there was no ground, on account of want of means, for practising the strict economy he might have been obliged to observe at an earlier period of their marriage. It might have been expected, therefore, that the opportunity now offered for effecting an arrangement between the parties, which might have been productive of a more cordial degree of affection between them than had hitherto existed, and that he might have been induced

alter the system he had so long adopted, of confining his expenditure within the narrowest possible limits.

During the cohabitation in Hyde Park Place, very little passes, of which the Court has any full or consistent account. Unfortunately, at this time, no reconciliation took place between them, for it was not till 1836 that Lady Dysart rejoined her husband at Buckminster, where he then resided. It is true, this is imputed to her desire to obtain from him a separate allowance,—that is, that he should make her an allowance in order that they might live separate and apart; and it does appear that some negotiation was set on foot for that purpose, and that an offer was made by the Earl that the Countess should receive £300 a year if she chose to live apart, and that she demanded (what was considered exorbitant) at first £6,000 a year, and afterwards £3,000; as the allowance to be made to her. Lord Dysart's account is, that the offer he made was not on condition that they should live separate, but that if she chose to separate herself from him, he would allow her £300 a year, to carry her intentions into effect. However, the negotiation was broken off, and nothing occurred till July, 1836, when she rejoined her husband at Buckminster, and during the time she so resided there, the circumstances occurred upon which, if she is at all entitled to relief, the question must depend whether Lady Dysart can claim a sentence of separation, on the ground that the acts of violence then committed have the effect of reviving the former acts at Iruham and Buckminster; or whether Lord Dysart is to have the sentence of the Court below affirmed, requiring his wife to return to cohabitation with him.

The general observation to be made upon this part of the case is, that here the same system of privation and insult was practised towards her. She had no control over her servants and establishment; if orders were not actually given to the servants not to obey her, still, nothing was to be done without first consulting the Earl. No visitors were to be admitted; she was secluded from all society; her only companion was her own personal attendant. Mr. Frederick Tolle-mache, the brother of Lord Dysart, was occasionally a

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visitors, but the Earl and Countess seldom dined together. The same habit of abusing her continued, and the same application of opprobrious names to her, which is, indeed, admitted by one of the brothers of Lord Dysart as having taken place in his presence. In short, it would be impossible to describe a scene of greater misery and discomfort than that which the Countess passed through in this period of six months, between the 6th July, 1836, and the 28th January, 1837.

It has been here again urged, that whatever inconvenience this lady suffered at this time arose from her own want of submission to her husband's will, and of conformity to his tastes and habits. But it was no easy matter to conform to such habits as his; or to make the sacrifices required, for, though they would have, perhaps, produced injury or inconvenience to the health of persons of strong and robust constitutions, they were habits little adapted to a delicate female, delicately brought up, and not accustomed to the inclemency of the weather to which she was exposed during the winter of 1836-37. At that period, she was in a weak state of health, and was attended during a part of this by Mr. Wing and Dr. Turner (up to February, 1837, at least), and it would seem that the circumstances of privation and hardship, which she was called upon to submit to, were sufficient to have imparted to her some degree of resentment against the person from whom she received these injuries.

In the year 1836, Lord Dysart (then Lord Huntingtower) was appointed High Sheriff of the county of Leicester, and it appears that his lady accompanied him to Leicester, and remained there during the Summer Assizes; and they appear to have lived together at this time upon more comfortable terms than at any former time of their cohabitation. She attended the Court upon some occasions with her husband, and sat upon the Bench with the Judge; she was present at the dinner he gave as High Sheriff at the Town Hall, and there is evidence from witnesses on both sides to shew that during the two or three weeks they were at Leicester, they lived more comfortably than they had ever done before, and it is very improbable that any thing should have given

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rious quarrel, at such a time, much less that she have been guilty of an act of violence towards him whilst fulfilling the duties of High Sheriff, and residing at the hotel, where they were subject to observation. But at this time they returned to Buckminster, and at the time of their departure, a quarrel arose. And here she said that Lady Dysart was the first to break out: it appears to have been very slight and trivial. Leicester for Buckminster in a carriage (a chariot), occupied by the Earl and Countess, with her parlant, Hill, and Mr. Frederick Tollenmache, who had Leicester, was also returning to visit them at Buckminster. His portmanteau was to be put, by the desire of Lady Dysart, into the carriage. Lady Dysart objected to it, and said that it might as well go by the carrier; but he insisted that his will and pleasure should be done, and that the portmanteau should be placed inside the carriage, at that time very fully occupied. Now this was as ludicrous an incident as can be to give rise to a quarrel. It does not seem to be a very unreasonable objection on the part of Lady Dysart. It, however, led to a quarrel; she resists, to a certain extent, his pleasure shall be obeyed, and the luggage is conveyed in the carriage to Buckminster. This should seem to have produced some degree of resentment on the part of Lady Dysart towards Mr. Frederick Tollenmache. Undoubtedly, it would have been better if the quarrel had on both sides been avoided. But as there is no other evidence in the case, it is necessary to put upon this part of the case (the case at Buckminster in 1836 and 1837) on behalf of Mr. Tollenmache, Mrs. Hill (then named Shaw), who was sent to her on the 17th July, 1836, and who accompanied her from Leicester to Buckminster. Every thing in the case of Lady Dysart depends upon the evidence of this witness, and the first question is as to the credit due to her representations. No imputation made upon her general character, or upon the truth of which she has given her testimony, as far as I

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can judge, for, on reference to the sentence of the judge in the Court below, I find he so states, and has not given an inflamed or exaggerated account of the circumstances. She is said to be subject to that favour of her mistress which attaches to all ladies but she is not said to be guilty of any wilful misstatement. She has, indeed, been called to depose, after a considerable lapse of time, to acts which occurred in autumn and winter of 1836 and the beginning of 1837, not being examined until 1843, and it is very possible she may not have a very precise and accurate recollection of the circumstances which occurred. Still, they are recent events than those at Edmonthorpe, Iron Buckminster, in 1826; and independently of this circumstance, the witness had been examined in the proceedings on behalf of the Countess, in 1837, and the circumstances would be more strongly impressed on her memory. That suit was abandoned, and I do not intend that any imputation attaches to Lady Dysart on account of the institution of that suit, or the abandonment of it. She commenced this suit in 1837 for a separation from her husband on account of the cruelty of her husband, soon after she left Buckminster, in which she gave in her Libel and examined witnesses upon it; the Earl gave in an Allegation, and certain of her letters were annexed, whereupon she abandoned the suit. It has been suggested that she abandoned it because she had no case; but I do not apprehend that to be the necessary inference. Nobody who has read her letters can doubt that she would have been most anxious that they should not appear before the public, and she would submit to privations at that time rather than consent to the publication of those letters. I think nothing is to be inferred to her prejudice on that account.

The description given by the witness Hill of the mode of life at Buckminster, in 1836, is very much in conformity with his general system of living at other times, but carried to a most extraordinary extent, and indeed, that the learned Judge in the Court below considered it hardly probable; but it is not deposed to.

witness alone, and is even admitted. Her account of the Earl's habits of life at this time, in her evidence on the 24th article of the Libel, is, that there was a deficiency of the common necessities of life; a great want of linen and of other articles very necessary for comfort, if not for decency. Every thing in the establishment was of the very meanest description, and the Earl forbade the servants to do any thing the Countess desired without first coming to him for orders. She had not even a teapot allowed her; at first she borrowed one of the steward, and when he wanted it, she made her tea in a jug; the top of the jug being broken, she covered it with a plate. The Earl, she says, debarred the Countess from society. The witness heard him tell her ladyship that he would not have a pack of people coming there after her. She says his language to his wife was coarse and vulgar; he called her all manner of names, and abused her mother and brother. The witness does not recollect the Earl's ever sleeping with his wife after their return from Leicester; they did not breakfast together, and they dined together but seldom. Upon the 25th article she says, the house was badly furnished; Lady Dysart's bed-room had but two slips of carpet, one on each side of the bed; the leg of the washhand-stand was broken and tied up with string; the bed-hangings were in a most filthy state, the Earl refusing to suffer them to be washed; a pane of glass was repaired by a piece of board, the Earl not permitting it to be mended, and the windows were so loose that the rain poured in so that the witness has seen pools of water, and has sopped up half a pint at a time, in the room. She says, Lady Dysart suffered much from the cold and wet, the water actually streaming in the passages, owing to the want of common care in keeping out the weather; that the house was not fit to live in, and it was at the risk of health and life that they stopped there; that Lady Dysart suffered in her health, besides being wretchedly uncomfortable, and even Lord Dysart, "who was accustomed to live more like a brute than a Christian," caught such a cold; that he thought he should have died. It is quite impossible to describe a state of greater misery.

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I have already said that there is only this single witness produced to these facts. But is there any reason to disbelieve the account she has given? Is there any person who will say that this lady was not kept in such a state of seclusion, as that nobody was allowed to visit her, and she had no associate save this servant, who had been hired to accompany her to Buckminster? There were no others from whom Lady Dysart had any chance of obtaining evidence in support of the charge, for the rest of the servants was under the sole control, superintendence, and management of Lord Dysart. I see no reason, upon general principles, to distrust the account given by Hill, and no attack has been made upon her credit, except so far as her evidence is in opposition to that of the other witness present upon the same occasion, and I am disposed to give credit to her from the manner in which she has deposed, and to depend upon her testimony, where it is not contradicted by that of another witness, or her own evidence or conduct.

There is one particular circumstance to which the Court must refer, as a most extraordinary one, which appeared to the learned Judge in the Court below to evince a want of common decency on the part of Lord Dysart, namely, the closing to his wife of certain places appropriated to purposes of privacy. Of this part of the case, I think, there is no denial whatever; and it is agreed that this order gave rise to a serious quarrel, which, in fact, led to the separation.

Lady Dysart was at this time subject to attacks of rheumatism and lumbago, and surely it was not unreasonable, and cannot be wondered at, if she remonstrated, and with some degree of warmth, upon the manner in which she was treated, if there is any truth in the account given by the witness Parker. Is this to be urged against her as a ground upon which she is to be debarred from relief, as if she provoked acts of violence? Am I to go to the extent of saying that Lady Dysart was bound to submit (as the learned Judge in the Court below said) to the whims and caprices of her husband, in every thing not sinful,—for that is the expression attributed to the learned Judge? But I think there must be some misapprehension of what fell from him, because, although it is undoubtedly the duty of a wife to

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t to the commands and wishes of her husband, there
be a point somewhat short of sin that would justify her
nee. If her health is affected by the state of the
in which she is compelled to live, and her husband,
at any reasonable cause, refuses to incur the smallest
se necessary to exclude the violence of the wind, and
and snow, his wife being subject to rheumatism and
go,—surely these are grounds upon which she might
and properly resist, or at least remonstrate. Again ;
ears that she was, as I have said, in an ill state of
,—whether from a miscarriage or not, it is needless to
e,—and she was attended by Mr. Wing and Dr. Tur-
The Court does not stop to inquire whether there was
in inclination on the part of Lord Dysart to call in any
olar medical attendant, he giving a preference to one
be to another ; it goes upon the more material facts.
ie of their quarrels occurred on the 8th December,
, which is pleaded in the 30th article, and the witness
peaks to what took place on that occasion, deposing to
its from a memorandum which she took and kept, at
Dysart's desire. It is urged against her that she was
sted to keep a diary by Lady Dysart, because she went
with a design to provoke her husband to commit an
f violence which would enable her to obtain a separa-

But I do not understand how this is consistent with
er argument of the learned Counsel, namely, that the
: conduct of Lady Dysart shews that she had no fear
o alarm at returning to cohabitation ; and that she was
us that the cohabitation should be renewed. The two
ents are inconsistent with each other. Now what
place on the 8th December, 1836 ? I pass by all the
ous quarrels and janglings between the parties, and
to the particular and important facts.

e witness Hill says that, on the evening of the 8th
nber, 1836, about ten or eleven o'clock, she went up-
to Lady Dysart's bed-room, in consequence of what
eard from the other servants, where she saw " Lord
ady Dysart both lying on the floor, he undermost, on
sok, holding her by the hands ; she lay with her back
s chest, her hands crossed before her, so that his arms

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were round her ; he appeared to be holding her. Lady Dysart said she should be strangled (but she thought there was no fear of that), and told her to put a pillow for her head, which was hanging ; the witness so, and Lord Dysart immediately clapped his own head upon it, making some remark as if he wished to turn it as a joke. The dispute, she understood, arose about a housemaid, whom Lady Dysart would not allow to get into her bed, Lord Dysart insisting that she should, and she would not till she should say something,—some nonsense—which she would not do for half an hour after the Countess came into the room, and when she said it, he let her go. The witness adds: "I observed that her ladyship's face was discoloured for some days afterwards, and she complained of her bosom also. She was hurt, I do not think that I could say seriously : she was bruised, and to be sore for some days." Here was an act of perjury, undoubtedly, committed by the Earl upon oath to compel her to make a sort of promise.

Upon interrogatory, the witness repeats the account much as before, with some additions, upon which no objection was made by Counsel, that the witness she could not suppose the Countess to have sustained a serious injury from the manner in which she (the Countess) conducted herself. She admits that the Earl did say, "Shaw, here's a pretty business !" and that they were laughing part of the time ; that it seemed to her as if what was in a quarrel was going off in joke. She remembers Lord Dysart laughed when she brought the pillow, and laid his head upon it, and that she (the witness) made him say, "Come, get up both of you," and it is very likely that Lord Dysart did say to her, in good nature, "Come, you nasty little thing, and help me." This certainly gives somewhat of a different complexion to the truth from that which it wears in her examination in chief. Still the fact is, there was clearly an act of violence committed, from which some injury arose ; she was bruised and sore for some days afterwards, though, before the promise was made and the Countess was released from the grasp of her husband, there was some joking between them.

circumstances had stood alone, as a solitary fact; it
 be been too much, perhaps, to say that this was an
 elty, such as would entitle the wife to a sentence
 ion on that ground alone. But it is not to be left
 e consideration of the Court, in considering other
 : with what a little provocation the Earl might be
 acts which have a more serious effect. It is true
 upon another interrogatory, that, when she went
 oom; the Countess was kicking at the Earl's shins,
 she could, as he held her, and that, before he left
 he shewed her his shins, which looked a little red,
 Dysart said, it served him right; that, on the fol-
 y, she sent him some camphire to rub his legs, but
 annot imagine how they could have been seriously
 Lady Dysart had only satin shoes, and she disbe-
 at any scars arose from such a cause. She kicked
 heels, for she lay with her back on him. She says
 art did remain in the room for a considerable time
 Countess got up, and during part of that time they
 ghing and joking together.

I said, this witness is the only person produced on
 Lady Dysart: there are several witnesses produced
 of Lord Dysart, and some who were present on this
 r occasion, and the question will in some degree de-
 m the credit to be given to one or other of these wit-
 One of these witnesses, and the most important one
 ole, for he was present on almost all occasions of the
 between the parties, is the person named William
 o resided with Lord Dysart, and performed all the
 have mentioned at Corby Heath, and who continued
 vice until 1840, and the question must depend upon
 ee of credit to be given to this witness, in contrast
 evidence of Hill.

the general style of the Earl's living, he does not
 th Hill. He considers the cottage at Corby Heath
 for Lady Dysart to have lived in. These are mat-
 ters, in respect to which the Court would not con-
 opinion of very great importance. But there is
 g in his evidence upon the 25th article, which

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shews, I think, the temper of this witness, and the learned Judge in the Court below says, he was "rather a slave than the servant" of Lord Dysart. He appears to have been his constant attendant from the time the Earl was up till he went to bed, which was sometimes at a late hour; that he was his only personal attendant, living with him from 1821 to 1840, and was afterwards employed on the estate. He comes forward, however, generally speaking, with a more favourable opinion of Lady Dysart than the personal attendant of Lady Dysart, has of the Earl.

Pick deposes that, after the parties came to Bucklebury from Leicester, they were sometimes quite friendly for a length of time, and then, "for some reason or other, not known to herself, her Ladyship would begin to quarrel with his Lordship." He says he has heard her begin to quarrel about the plain of the meat and the bread; one thing brooding under another, till they got to high words. "As far as the origin of their disturbances," he says, "they have always begun by her Ladyship: it appeared to me that her object was to irritate and provoke his Lordship." He gives the general character which the witness gives of the Earl in all of these quarrels; every thing is attributed to his Lordship; her object is to aggravate and provoke the Earl. He says he treated Lady Dysart with affection and respect; that he comes prepared to give full effect to what passed in conversation with her Ladyship. He says the household was supplied with plenty of provisions; and I think the general result of the evidence, that there was always a dinner though Lady Dysart might not at all times think the dinner was such as, under the circumstances, her health required.

The witness gives his account of what took place on the 8th December, 1836, as he says, between 7 and 8 o'clock. He states that the Earl sent him to fetch Fanny Wilmot and Elizabeth Haynes to make her Ladyship's bed; upon which Lady Dysart said she would not have Elizabeth Haynes come into her room. The Earl said, "Poh, now, now, Pick, go for them;" he went, and they followed him into the room. Lady Dysart said, Haynes should not come

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she would bundle her out if she did, and the Earl laid hold of her Ladyship to prevent her from striking Haynes. He says, all the time Haynes was making the bed, Lady Dysart kept calling her "whore," and "strumpet," and every Billingsgate name she could think of; that the Earl kept holding her, and she told him that, if she got loose, she would tear his eyes out, and knock him down with a poker; and he said, "Well, then, I shall hold you here till you promise that you will not strike me nor tear my eyes;" that he held her in front of him, with his arms round her, and holding hers down; she then set to kicking him till, as the witness afterwards saw, his legs were all black and blue; he told her then that, if she kept on so, he must lay her down on the floor, till she had promised not to ill-use him any more; that he then laid her down upon the floor; she still kept kicking, and he put his leg over hers to prevent her; she still kept saying she would not beg pardon, or promise not to do so any more, and he said he would keep her down till she did: he held her there, it might be, an hour and a half. Upon interrogatory, giving an account of the same transaction, he says, the bed had not been made because his Lordship had not given orders for it to be made; that the Earl was in the room before he came; that the first word spoken about the bed was his Lordship telling him to order Wing and Haynes to come and make it; that, when he returned, he found the Earl holding Lady Dysart before him, but not on the floor; he was not in a rage, or swearing, or cursing; the witness did not think it a joke or jest so much as a bit of a pet; he believes Lady Dysart was serious about it. This is hardly consistent with his evidence in chief, where he speaks of Lady Dysart's threatening to tear out the Earl's eyes and to knock him down with a poker, and now he speaks of the affair as not so much a joke or jest as "a bit of a pet."

Another witness has been examined as to this transaction, Fanny Christian (then Wing), one of the females called to assist in making the bed. She deposes to finding the parties on the floor together, and that Lady Dysart said she would knock down Haynes with the poker; that her violence was

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directed against Haynes, not against Lord Dysart. She says her Ladyship called Haynes all manner of names, and the Earl told her she should get up if she would promise not to strike Haynes. This is the interpretation which this witness gives of the matter. She has been examined to prove the manner in which the parties lived together, the supply of provisions, and the complaints of Lady Dysart of what was set before her for dinner, her object being to irritate the Earl. She says, when dinner was served, in the library, she would say, "Is this a dinner for me?" Lord Dysart would say, "Yes, and a very good dinner too; if I can eat it, I think you may." She imputes all to Lady Dysart. Whether an impression was made upon the witness's mind by being told that Lady Dysart called her all manner of names, may be a question; but she, as well as Pick, says, that all was done by Lady Dysart to provoke the Earl; he is placid, and the only violence he uses is in order to prevent her from committing personal violence, not, as this witness says, upon himself (which was the statement of Pick), but upon Haynes. Elizabeth Haynes deposes to the same effect, for she says, when she went into the room towards the bed, she found Lady Dysart upon the floor, and that she called her (the witness) all manner of names, and attempted to strike her. "What she said while I was present," she says, "was only against me." Then, supposing there is any thing in the act itself, it assumes a very different aspect from what it bears in the plea: it is no attempt on the part of Lady Dysart to commit violence upon the Earl, but upon Elizabeth Haynes. It is true that Lady Dysart does, on this occasion, make use of expressions which were extremely improper, and of which she must afterwards have repented (as observed by the learned Judge below); but Lord Dysart pleads that the violence of the Countess was directed against him; whereas Haynes and Christian depose that it was directed not against the Earl but against Haynes, Pick differing from both these witnesses. Under these circumstances, I think there is no ground to suppose that Hill has given any false representation of what passed. It might have been a different thing

if it had been proved that the violence was directed against the Earl,—tearing his hair, scratching his face, and flying at him in a violent and outrageous manner from the distance of four yards, according to the plea;—but the witnesses have given a different account as to the object of the violence, namely, that it was Haynes, and it is true that the Countess permitted herself to make use of language towards that person which every body must consider as extremely improper, and no way justified by the conduct and character of Elizabeth Haynes, who is represented to be a respectable person. If the question, however, had rested upon this act alone, the Court would not have felt itself in a situation to say that it was such an act of cruelty as would entitle the party to a separation on that ground alone.

But what follows? In the next month, on the 6th of January, 1837, another transaction of the same kind takes place; which must shew, I think, that the passions of the Earl are not under his control, and that a very slight provocation is sufficient to make him act in a manner which, if it does not amount to actual cruelty, very much savours of it. The 31st article of Lady Dysart's plea sets forth the opprobrious and scandalous names which the Earl called her upon the previous day, and that on the 6th, in the presence of the servants, he used similar expressions, pinched her, held her down on the sofa, and otherwise so violently ill-treated her, that her flesh was bruised and discoloured. The witness examined upon this article is Mrs. Hill; she does not, however, recollect what took place; but William Pick, who is examined upon Lord Dysart's Allegation, gives this account of the transaction: that one day, after dinner, the parties were together, and, the Earl's napkin lying on the floor, Lady Dysart kicked it; that he told her not to do so, as he did not like his napkins to be kicked, but, as she did not "give over," the Earl took hold of her and laid her down on the sofa, "not hurting her at all, but just to hold her ladyship till she would promise not to kick his napkin again." He says that the Countess did not scream, or appear any way ill-tempered; that they had been good friends just before this happened, and when he saw them about an hour

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afterwards, they were so again. In his examination upon interrogatory, he gives this account. He says he was waiting at dinner; that he does not recollect the Earl to have been ill-humoured at dinner; he believes he did not curse or swear; and that, after dinner, Lady Dysart did go to her husband to endeavour to coax him into a better humour which she would do sometimes, not often, trying to annoy him more frequently than to be friendly; that she did not accidentally tread upon the napkin; that the Earl, he believes, did not swear at or abuse her; "he might have said 'Damn it, you should not do so,' but that," the witness says, "I do not call swearing at her, neither is it." He will not swear that she struck the Earl, who held her, to prevent that; "he is a tall and very powerful man, and it would be an act of madness in a woman to attempt to fight a man like his lordship." He says that, whilst he (the witness) was in the room, the Earl was not in a passion, and that he did not hear him use any scandalous expressions.

This account shews how slight a circumstance would give rise to such an ebullition on the part of the Earl: this is the mode in which he enforces his rights. He is justified in enforcing his rights as a husband, but he is not to enforce them in an illegal manner; and this occurrence shews that it is not a necessary mode of coercion which he resorts to in order to prevent injury to himself, but that the slightest provocation on the part of his wife,—such as kicking his napkin, when upon the floor,—gives occasion to this treatment, by a person who pretends that he has an affection for his wife, and who takes this method of compelling her obedience to his will and pleasure.

The transaction of 23rd January, 1837.

But the most serious circumstance is that which occurred on the 23rd January, and which is the most important transaction of the whole, since it led to the immediate separation of the parties, and it is upon this transaction, taken in conjunction with all the other circumstances,—the want of consideration and of affection towards his wife, his disregard of all her comforts, the privations and hardships which he imposed upon her, and to which she was compelled to submit,—that the Court is to form its opinion as to the application of the principles of the law of cruelty to this case.

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The transaction is pleaded in the 32nd article of Lady Dysart's Allegation, and upon this article the witness Hill is examined. She says that she heard the parties come upstairs, William Pick with them, into Lady Dysart's bedroom, and soon afterwards the sound of high words between the parties; presently, she heard Lady Dysart call out "Murder!" whereupon she went into the room, and found Lord Dysart sitting on the floor, with his legs extended, holding the Countess before him, treating her with violence; he was in a passion; he grated his teeth, and called her "Monster," "Devil of Hell," "Infernal beast," "Bitch," "Whore," and many more gross terms; that Lady Dysart screamed, and said "Go for a constable," and Lord Dysart said, if Pick or the witness went for one, they should never enter the house again, and he "would kick them burning to hell;" that he held his wife forcibly for an hour and a half, abusing her great part of the time, and pulling and twisting her hands and wrists as he held her, so as (she thinks) to hurt her seriously; that it really was cruel and brutal treatment; that Lady Dysart made very little reply to him, and during his greatest fury, never said a word; she asked him to let her get up, but he refused unless she made some promise about throwing water out of the window; that the Earl told her "he mortally hated her," and, "if the law allowed him, he would give her a damned good thrashing, but he knew he could not do that, and therefore he would punish her as he did, for he hated her mortally, and would say so if he had but three minutes to live;" that she at last was obliged to say what he required of her, and he then let her go; that she was so cramped that she could not get up without his help, and he did assist her; that Lady Dysart was bruised and hurt seriously; he pulled and tore at her enough to jerk her arms out of their sockets, looking and acting more like a demon than a human being; her wrists and arms were very much discoloured, bruised, and strained; and the witness says she was alarmed for her whilst in his grasp, and really feared he would dash her brains out on the floor; and that Lady Dysart resolved, as she said, to leave Buckminster the next day, but she was hindered.

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She is examined also upon interrogatory, and the account — she gives there it is necessary for the Court to observe — upon, because it is said to be inconsistent with what she has deposed in chief, to the extent she has described the occurrence. She says that Pick came for her, and upon entering the room, Lord Dysart was sitting upon the floor, and the Countess before him, he holding her wrists, she appearing frightened; that it is possible that, whilst the witness was in the room, she might say to them “that it was a pity they did not try to live happily together,” but not on entering, for then his language, looks, and voice were such as to frighten her, and, besides that, for the first part of the time, he was tearing at her wrists violently; she was not kicking, or attempting to kick, when witness saw them; she had not the power, as he held her. The witness says she has not the least recollection of his making any complaint of this kind, or of her striking, biting, or pinching him; she was not a person to use any such violence unprovoked, and if she threatened any thing of the kind, it would not have terrified him. The Earl, she says, was very odd about papers, unlike any person of sound mind; nobody was to touch them; and she does not think that Lady Dysart did ever meddle with any paper belonging to him: but as to throwing slops out of the windows, which was the principal, if not only, grievance on this occasion, the witness dare say that he might persist in holding Lady Dysart by the wrists until she would promise not to do it again; Lord Dysart did not say he would hold her, as well for her own sake as for his own protection, whenever she repeated such violence; he did say that “he should like to give her a damned good thrashing, to bring her to her senses, and would do it if the law would let him; but as he could not do that, and keep within the bounds of the law, he would hold her as he then did, whenever she displeased him.” She says, “I was not laughing all the time; at first, it was no laughing matter at all; afterwards, I very likely did laugh at some of the strange expressions which Lord Dysart was in the habit of using; otherwise I did not. There was no laughing and joking between them that night, as I remember. A great deal more passed, and there was a good deal of jangling,

any joking. When I laughed, it was at such excess as that no one scarce could help it. They parted friendly terms."

In the next interrogatory, she says that Pick could not enter the room for any length of time whilst she was in it. Lord Dysart ordered him, a few minutes after she entered the room, to go and send the other servants to bed, and to remain at the door. The witness will not swear that Lord Dysart did not call the Earl a monster, a wretch, &c., though she does not remember the latter term; expressions, she says, were called forth by his language and by his violence; she did not begin, but, as it took up his own words. Lady Dysart did not treat it of what he said with ridicule: she did not speak.

Then the witness goes on to depose to certain expressions as made by Pick, which he denies he ever did

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, if this account of the witness Hill be true, there is no doubt that this was an act of legal cruelty—of

And all this violence for what? Merely because she thrown slops out of the window, and would not consent to do so again! Surely this is not a justifiable enforcing of his rights, because she would not obey his command not to throw the slops out of the window. The means of accommodation not being afforded to this rich man, no man of common decency would deny him. Can it be said that this is not cruelty,—cruelty for which his wife would be entitled to legal redress, if there be a reasonable apprehension of its recurrence? and can I say that there is no such reasonable apprehension, seeing what circumstances cause these ebullitions of passion? It seems to me that, if the facts are established, if this witness is to be credited, here is an act of violence coming within the strictest definition of what is meant by "legal

" Can any one say that there was any provocation which would justify such a mode of enforcing obedience? No. There was scandalous abuse of the wife; abusive terms were applied to her, for which she could have no provocation that would justify their use; and

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can the Court be justified in compelling her to return to cohabitation with a person who, upon such slight pretences, can give way to his passions, as he did on the one or two other occasions?

Then what is the difference between the evidence of Pick and that of Hill? Pick, upon Lord Dysart's Affidavit, deposes that the parties got to words about Lady I throwing slops out of window, which the Earl did not prove of, but she said she would; and, after they had been "arguing upon it" for some time, Lady Dysart flew at the Earl, as if to tear his hair; to hinder which, he caught her, and as she was going to kick him, he said he would lay her down, for his legs had not recovered the last time he laid her down and held her, which he said he would do until she should promise not to throw any more slops out of the window. The witness says he went away for some time, and does not remember Shaw (Hill) being there. He does not remember Lady Dysart calling to him for a constable, or the Earl saying, "Damn the constable, he will send him (witness); and that if any one went for a constable, I would send them burning to hell." There was no quarrel that he saw towards Lady Dysart; she was in a great rage, but the Earl was cool. This account, to be sure, differs very materially from that of Hill, not only as to the circumstances, but also with respect to the time, for Pick says it to have occurred about four o'clock in the afternoon, while Hill fixes it at much later in the evening. But Pick testified upon interrogatory, and he there says he was sent at the beginning of the scene; that it began with Lord Dysart saying he would not allow any slops to be thrown out of window; they should be carried down to the Countess said she would throw them out. The witness is sure the Earl did not call her any opprobrious name, but took hold of her gently, to prevent her striking him; he was very gentle with her; he put her down on the floor and held her, but without any violence, or hurting her in the least. He did not appear to be in a rage, but in a good humour. He will not say it was a joke or jest, but the Earl was serious in requiring that she should not throw

out of window, but he was not in any bad temper : it, or at all.

The question, then, is, to which of these witnesses the Court is to pay attention? If it is to be considered that the witness is prejudiced and biassed in favour of Lady Dysart, why it may be said, with equal confidence, that Pick has sworn in favour of Lord Dysart, and is as likely to misrepresent what took place as Hill; and I cannot help thinking, looking at the manner in which the plea of Lord Dysart, in this part of the case, is drawn, that something more did take place than Pick has stated or remembers. He says nothing about the constable, or giving Lady Dysart any assistance, or any thing of that kind; every thing, according to him, passed in perfect good humour, and no bad language was used during the time he was present. But it is clear from Lord Dysart's plea, that something more did take place than is described by Pick, who was not present during the whole time. The plea of Lord Dysart is to this effect: that, an altercation occurring between the parties, provoked by the Countess insisting upon throwing some furniture out of her bed-room window, in the course of it, the Countess having worked herself into a rage, and flown at the Earl, he was compelled to take hold of her by the waist, for his own protection, upon which she began kicking his shins, and he placed her on the floor, in the gentlest possible manner, for his protection; that the Earl called Hill into the room, and explained to her, in the Countess's presence (who did not deny it), his reason for placing her on the floor, at which Shaw only laughed, and said, "What a pity it is you two cannot live happily together!" that the Countess, being extremely violent, called to Pick to fetch a constable—(Pick recollects nothing about the constable)—that the Earl did say, "Damn Pick and the constable too!" that, during the greater part of the time, the Earl, the Countess, and her maid, were laughing and joking together—(all this laughing and joking is positively denied by Hill)—that the Earl, in consideration of his wife's excessive violence of temper, at the commencement of the altercation, did abuse her, and say "she deserved a good

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thrashing"—(we have nothing of this kind from Pick, but we have it from Hill, that the Earl said, if it were not for the law, he would give his wife a good thrashing)—that ninety-nine husbands out of a hundred would give it her; but such abuse on his part was provoked by most gross abuse on the part of the Countess, and her menaces of "paying him off," of "tearing his eyes out," and the like.

This is the manner in which the plea of Lord Dysart represents what took place; but Pick remembers nothing about sending for a constable, or the remark of Lord Dysart, "Damn Pick, and the constable too!" It is clear that Pick was not only not present during the whole time, but that he has not stated all the circumstances which occurred whilst he was present, according to the plea of Lord Dysart himself; and I say that this tends to confirm the account given by Hill. As to her laughing, she says she may have laughed some part of the time; but that it was no laughing matter, as the Countess was seriously hurt.

I am of opinion that I am bound to give credit to the testimony of Hill, which consists much more with the probability of the case, than the account given by Pick, who either was not present, or did not hear what occurred, or has not told the whole facts; for Hill cannot have invented all these circumstances, some of which are corroborated by the plea of Lord Dysart. I am of opinion that this is an

An act of legal cruelty. of act of illegal violence and of legal cruelty, and one which it would be almost impossible for Lady Dysart to guard against, if compelled to reside in the same house with her husband, since it shews that, upon any slight occurrence, as when she infringed such a command as not to throw slops out of the window, or kicked his napkin on the floor, after dinner,—the same rough means of extorting a promise of obedience would be employed: I say, looking at Hill's account of the manner in which Lady Dysart was treated, which account is not, in my opinion, weakened by the fact that she did, at a subsequent period, laugh at something that was said,—this was an act of illegal violence and of cruelty committed by the Earl, which entitles his wife to protection at the hands of the Court.

Nor is there any thing to prevent her from obtaining a sentence in what subsequently took place. It is clear,—whether from this act of violence or not—whether from her lying upon the floor of her bedroom for so long a time at this season of the year (an inclement season)—Lady Dysart was obliged to have medical attendance. The influenza her complaint is stated to have been: influenza may have been produced by the manner in which she was treated on this occasion,—kept on the floor for an hour and a half,—and she was confined to her room and to her bed for some time afterwards. Whether this was the immediate effect and consequence of what had taken place, it is not material to inquire; but it is quite clear that the violence must have produced serious effects to her, if the evidence of Hill is to be believed.

New Lady Dysart continued to reside there until April in that year. It may be true that she was well enough to have gone away, and she might have gone without any interference on the part of the Earl; but, for some reason or other, she remained till April. No reconciliation, however, took place: perhaps she remained in the hope of a change in his manners, which would have enabled her to perform her domestic duties in a manner less disagreeable and prejudicial to herself; but no personal communication took place between them. She seems still to have expressed a strong regard and affection for her husband, even at this time; but no reconciliation takes place. There is no condonation, no return to cohabitation, though she might, perhaps, have overlooked this act, as she had done other acts coming less within the definition of legal cruelty.

What, then, is to prevent the sentence of separation? It is said, there are letters, annexed to Lord Dysart's Allegation, which prove that she could not have been under any apprehension of personal violence, for that their general tenour shews a desire of returning to cohabitation; and undoubtedly such is the fact. She was desirous that he should come to her father's house, where she was residing, where there was not the least apprehension that any act of personal violence would be committed, and where she was safe

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from all motives on the part of the Earl to quarrel with her. From the tone and tenour of these letters, it was evident her purpose, if she could, to produce a reconciliation, induce him to reform his manners, and treat her with kindness and regard; but there is a reference in them to acts at Buckminster, in December, 1836, and January, 1837. They may take off, in some degree, from the effect which the acts took place at Edmonthorpe, and Irnham, and Buckminster, at former periods, but they cannot alter the effect which occurred on the 23rd January, 1837, which I consider an act of legal cruelty. As to the provocations offered to Lady Dysart, what were those provocations? That she threw a glass out of window, and kicked his napkin, and refused to promise not to do so again; for as to personal violence, that was directed against Haynes. There is, indeed, evidence spoken to by Pick and Fanny Christian,—an exchange of words which conveys an imputation by Lady Dysart of a grievous offence to the Earl, on one occasion, after dinner, when she used a particular epithet, sufficient to inflame the passions of any man. But so far from its producing this effect upon the Earl (who is described as hasty and impetuous), it is represented as taking no notice whatever of the imputation—as passing it over without any sign of anger, or even remonstrance. I must say that, in my opinion, this detracts very materially from the credit of Pick and Christian. I think it is impossible that this could have taken place as they represent, without setting loose that violent and intemperate temper and disposition which the Earl indulged in on slighter provocations. I doubt if it did take place; further; I am strongly impressed with the conviction that it did not take place at all, for it is impossible this imputation could have been cast upon the Earl without a remonstrance, without an act of violence, without coercion, without extort a promise that she would never repeat it; and I say, that something short of actual violence, affecting limb, or health, would have been justifiable. But it was passed over with the utmost indifference.

Then is there any condonation? None. The learned Judge of the Court below was of opinion that there had been no condonation.

Again, is the distance of time any bar? In *Westmeath v. Westmeath* it was as great as in the present case; and in *D'Aguilar v. D'Aguilar*, the suit was commenced after twenty years of separation, and the Court did not consider the acts obsolete.

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I am perfectly well aware of the great importance of keeping parties who enter the matrimonial state to the performance of their matrimonial duties, and that it is the duty of a wife to conform to the tastes and habits of her husband, and to sacrifice a great deal of her own comfort and convenience even to his whims and caprices; that she ought to submit to his commands, and to endeavour by prudent resistance and remonstrance to induce him to change his manners, if they are disagreeable to her. But when I see no serious provocation given and these acts occur, how can I send a wife back to a husband who seems to know (according to Hill) how far the law will permit him to go—that the law will not allow him to give her a thrashing, which he was inclined to do, but that it would permit him to extort a promise, not by gentleness, but by punishing her in the way he is represented to have done? I do not think I should be justified in saying she could return with safety to the discharge of her matrimonial duties, though in this case it appears that she had very few duties to perform but to submit to her husband's will and pleasure. I trust I shall not be considered as trenching upon the rule and principle of the law which requires a wife to sacrifice her wishes to those of her husband, if I hold that the Countess has proved her case; has proved an act of illegal violence and a reasonable apprehension that, on a very slight occurrence, the same kind of violence will be resorted to.

I am of opinion, upon the whole case, that I must pronounce for the appeal, feeling, as I do, great distrust of my own opinion when it is opposed to that of the learned Judge of the Court below; and this has induced me to postpone my decision for a much longer period than I could have wished; but, having satisfied myself that the view I take of this case is consistent with every principle of law, I am bound to declare my opinion that the Countess has proved her case, and is entitled to a separation.

Appeal pronounced for;

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I therefore pronounce for the appeal, retain the principal cause, reverse the sentence appealed from, and pronounce for a separation between the parties.

An error in the proceedings in this case raised an important question of practice, which was decided in the ensuing term.

Proctors:—Orme, for the Appellant; Stokes, for the Respondent.

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Suit for divorce by reason of cruelty and adultery, commenced by the wife against the husband, met by a plea of adultery charged against the wife: the wife's charges not sustained; the husband's sustained, and a sentence of separation at his prayer pronounced for.—Evidence of the paramour.—Where the adultery of the wife is established, and the husband is proved to have had the venereal disease at the time when

KING v. KING.—Cause.—This was a suit commenced by Mrs. Maria King against Mr. John King, her husband, for divorce by reason of his cruelty and adultery. The (after reformation) pleaded as follows:—

1—3. The marriage, on the 30th October, 1841, and the citation of the parties at a public-house, kept by the husband (licensed victualler), called the *Black Swan*, in Little Card

4. That the wife was compelled to attend at the bar of the public-house, exposed to insulting observations and ill-conduct from the husband.

5. That, soon after their marriage, the husband used violence towards his wife, frequently struck her, and in November, 1841, she having called him "William" instead of "John," he inflicted a violent blow on her breast, for which she was obliged to have medical advice.

6. That he was in the habit of leaving home early in the morning, and returning intoxicated, neglected his business, throwing the labour upon the wife.

That he encouraged the servants to insult her, and took measures to protect her from insult by W. H. D. and others, and treated and neglected her.

8. That, in the middle of 1844, he went to Margate, where he formed an adulterous intercourse with divers strange women, and in consequence became infected with the venereal disease.

9. That, at Christmas, 1844, he was

tended by J. M., a surgeon, and treated for such disease, and when remonstrated with by the wife, he admitted the fact. 10. That in March, 1845, he went to Margate for three or four months, and whilst there, was attended by a surgeon for such disease. 11. That he returned in July, 1845, and commenced immediately injurious, cruel, and violent treatment of his wife, and accused her of having given him the venereal disease, repeating such false and cruel observation publicly in the bar of the *Black Swan*. 12. That he went again to Margate in August, 1845, and the wife, having been insulted, summoned him to return; that he came back on the 8th August, when a quarrel took place, he abused her, and threatened to expel her from the house, which she left, and has not since returned to him. 13. That from the time she discovered that her husband had the venereal disease, she had had no conjugal intercourse with him.

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the wife's paramour is likewise infected, the presumption of the law against the husband shifts, and the wife is bound to shew that he contracted the disorder from another person than herself.

The admission of this Libel was opposed.

1845.

Dec. 15.

ARGUMENT.

Addams, Dr., for the husband.—When the Court recollects the rank and condition of the parties, it must see that this case is a very trumpery one, and will reject the Libel altogether. Of cruelty there is none (for no witness is vouched upon the 5th article, except the medical attendant), or it has been condoned; the wife pleads that, though she knew her husband was infected in the Christmas of 1844, she did not separate from him until August, 1845, though she pretends there was no connubial intercourse between them.

Bayford, Dr., on the same side, cited *Evans v. Evans*,* and *Oliver v. Oliver*.†

R. Phillimore, Dr., for the wife.—The Libel sets up one of the grossest cases of filthy, brutal cruelty ever brought before the Court. Supposing the cruelty had been condoned, the conduct of the husband, in August, 1845, when he used abusive language to his wife, and threatened to expel her from the house if she did not leave it, was a legal revival of the former cruelty, as well as of the adultery. *D'Aguilar v. D'Aguilar*.‡ *Durant v. Durant*.§ The charging the wife, before strangers, with giving him the

* 1 Hagg. C. R. 37.

† *Ibid.* 364.

‡ 1 Hagg. E. R. 781.

§ *Ibid.* 733.

MARCH 10. venereal disease, and threatening to turn her out of door
King v. King. are acts sufficient to revive any which might have been condoned.

Twiss, Dr., on the same side.—Acts of cruelty, to revive former acts, need not be so strong. *Bramwell v. Bramwell*. Of the supposed cohabitation of nine months, great part the time the husband was at Margate; there must be mere cohabitation, but connubial intercourse, to constitute condonation, and it cannot be the presumption of law there was such intercourse at a time when the husband was infected with disease.

JUDGMENT.

DR. PHILLIMORE.—I cannot arrive at the conclusion suggested by the learned Counsel for the husband, that, if the facts were proved, they would not support a sentence of divorce, and that consequently this Libel is inadmissible; for, in my opinion, it pleads facts which, if capable of proof, would be sufficient to entitle the wife to the relief she prays. Some of the articles, however, require refutation.

(After directing certain reforms in the Libel.)

It is not necessary, in the present stage of the cause, to consider the question as to the revival of acts condoned; it is sufficient to say, that there is enough alleged on the face of the plea to make it admissible, and, if the facts are proved, to entitle the wife to a separation.

1846.
April 22.

An Additional Article was admitted, which pleaded that about the middle of May, 1844, the husband went to the house of ill-fame in Trinity Court, Aldersgate Street, and remained there a considerable time, and there committed adultery.

May 8.

A Responsive Allegation, on the part of the husband, was admitted, which, after counterpleading the articles of the Libel, charging him with cruelty to his wife, and pleading that he treated her with marked kindness and indulgence, alleged that, some time after the marriage, Mrs. King

tracted an improper intimacy with a person named Charles Allen, and gave him presents; that, in January, 1844, she accompanied Allen to a house of ill-fame in Bow Street, Covent Garden; that, on the 13th April, 1844, she left London, on pretence of visiting her relations in Suffolk, and quitted the coach at Colchester, where she was met by Allen, with whom she went to the *Three Cups*, where they slept together, and staid till the 15th, passing as husband and wife; that, at the period referred to in the 8th article of the Libel, when Mr. King went to Margate (in the middle of 1844), he had contracted the venereal disease from his wife, who had become infected through a criminal intercourse carried on by her with Allen or some other person; that, on the 26th April, 1845, on pretext of going to see her mother at Eye, Mrs. King again went to Colchester, met Allen there, and went with him to the *Three Cups*, where they staid, as man and wife, till the 28th. It pleads that the husband was ignorant of his wife's adulterous intercourse with Allen until this suit was commenced, and (in response to the Additional Article) denies the visit to a house of ill-fame in Trinity Court, and avers that there was no house of ill-fame in that Court in May, 1844.

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An Allegation, on the part of the wife, was admitted, Nov. 25. which counterpleaded the resort, with Charles Allen, to a house of ill-fame, and denied indecent familiarities or adultery with him, as well as the communication of the venereal disease by her to her husband.*

Amongst the witnesses examined on the wife's Libel was Charles Allen, the alleged paramour, who, upon interrogatory, admitted that he was in the habit of walking with Mrs. King, but declined to answer whither he was in the habit of accompanying her when he met her in the street; he also submitted that he was not bound by law to answer, and declined to answer, whether he had been with Mrs. King, at Colchester, in April, 1844, and April, 1845, as well as other matters inquired of in the interrogatories; he likewise admitted that, at the time when Mr. King was at Mar-

* The personal Answers of the wife were debated before the Court the same day. See *ante*, p. 59.

MARCH 10. gate, in 1844, he (the witness) was infected with the venereal disease.
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1847.
 Feb. 24.

After publication of the evidence, application was made to the Court, upon affidavit, to rescind the conclusion of the cause for the purpose of receiving an Allegation, on behalf of the wife, pleading that Charles Allen was not at Colchester at the times when it was alleged that he had there committed adultery with Mrs. King.

JUDGMENT.

DR. PHILLIMORE.—Even at this late stage of the cause the Court might admit an Allegation, pertinent to the issue stating such grounds as would justify the Court in so doing. But every application of this kind is *stricti juris*, and the question is, whether the ends of justice are likely to be answered by admitting this Allegation, or, on the other hand, whether, so far from assisting justice, it would not ultimately defeat the ends of justice.

The wife instituted proceedings against her husband for a divorce by reason of his adultery and cruelty; he counterpleaded those charges, and pleaded adultery against the wife. Sufficient opportunity was afforded her to give a full denial of the charges made by her husband. The husband's Allegation set forth that she went with Charles Allen to a house of ill-fame; that she communicated to her husband the venereal disease, and it pleads two separate visits to Colchester, in 1844 and 1845, where she committed adultery with Allen. The Allegation of the wife, in reply to the husband's plea,—and which was not admitted till the 25th November last,—counterpleads the resort to a house of ill-fame with Allen, the giving presents to him, and the communication of the venereal disease by her to the husband but no notice is taken of the other glaring charge against her. It is said she could not ascertain that she had the means of procuring evidence; but the fact was within her own knowledge, and she could have counterpleaded the averments, and could have proved her own *alibi*. She did not however, do so; and she now comes forward to set up an *alibi* on the part of Charles Allen. I should throw a discredit upon the proceedings of the Court, and open a door

to perjury, if I were, at this late stage of the cause, to allow this matter to be gone into. I have no hesitation in rejecting the application. MARCH 10.
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The case came on for argument on the merits: *R. Phillimore* and *Twiss*, Drs., for the wife; *Addams* and *Bayford*, Drs., for the husband. MARCH 1.

DR. PHILLIMORE.—From the pleas in this unhappy case it appears that three issues are raised for the consideration of the Court; first, the cruelty of the husband; second, the adultery of the husband; third, the adultery of the wife. MARCH 10.
JUDGMENT.

From the nature of the facts developed by the general tenour of the evidence, it will be most convenient, inasmuch as it will conduce to brevity and perspicuity, to reverse the order in which these charges have been preferred, and to direct my attention in the first instance to the charge of adultery against the wife.

I will begin with the evidence in support of the article pleading the adultery of the wife with Charles Allen, in 1844 and 1845, at Colchester. Charge of adultery against the wife:

(After reading the evidence.)

Now this is a chain of evidence so complete that it can leave no doubt in the mind of any person that adultery was committed between these parties in April, 1844, and April, 1845.

The Allegation pleading these charges was given in on the 8th May, 1846, and a Responsive Allegation was put in on the part of the wife, bearing date in July, 1846, but not finally admitted until the 25th November, in which no response was made to these charges, which, in fact, remained uncontradicted in averment until the sitting of the Court on the 24th February last, when an Allegation was tendered to it, accompanied by an affidavit stating that it had only been within the last very few days that Mrs. King could ascertain that she could obtain the requisite legal proof that she had been falsely accused of going with Charles Allen to Colchester on the 26th, 27th, and 28th April, 1845. But I was of opinion (and subsequent reflection has confirmed

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established.

Charge of cruelty against the husband :

me in that opinion) that, in so late a stage of the case after publication, it was only for the admission of me and not upon the discovery of the means of discharges so long known and promulgated, that I should warrant, in the exercise of my discretion, in such an Allegation. I know the cause is never good the Judge, but I thought I should be opening a door jury and subornation of perjury, which the experience of all Courts has shewn are more frequently practised proof of an *alibi* than by any other expedient to which perate case may incite an unfortunate suitor to resort, think it is a very singular fact, that the alleged *Charles Allen*, was vouched as a witness to prove *alibi*, who, when he was questioned on the 17th instory, as to whether he had been at Colchester with *King*, on the days in question, had refused (as he right to do) to answer the question, on the ground might criminate himself. If he had not been at *C*ter, it would have been as easy, when the interrogator addressed to him so long ago, to say "I was not there was at Kennington," as to have proved that fact as Allegation tendered to establish the *alibi*, and the danger of admitting a plea of that description.

Being satisfied, therefore, as to the proof of the sion of adultery by *Mrs. King* at Colchester, I think unnecessary to enter into the details of the evidence in support of the other charges against her. I do therefore, to examine into the general conduct of *Al*terer, as detailed in his own depositions, or to consider, if the other proofs had been less conclusive, as dence as he has given might have assisted me in coming practical conclusion as to the guilt of *Mrs. King*. I necessary that I should examine the evidence produced support of the charge contained in the 9th article husband's plea, touching the resort of *Mrs. King*, in pany with the alleged adulterer, to a house of ill-f Bow Street, Covent Garden. I am clearly of opinion the wife has been guilty of adultery.

I pass on now to the charge of cruelty preferred

the husband, which is spread over several articles of the plea, and on which several witnesses have been examined. I shall, however, dismiss it with a very few observations, because the Counsel for Mrs. King have abandoned it, and because, in so abandoning it, I am of opinion that they have exercised a very sound discretion. I think it, however, due to Mr. King to state that, from the best consideration I have been able to apply to the evidence upon this branch of the case, I am led to the unhesitating conviction that the charges of personal violence and cruelty brought against him by his wife have been entirely disproved.

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The third and only remaining point to be considered is the adultery of the husband. Now what is the nature of the charges, and what are the media of proof by which they are sought to be established? No indecent familiarities, no proximate acts of any description, are averred, nor indeed, is it averred that he had adulterous intercourse with any particular female. But it is pleaded, first, that, about the middle of May, 1844, he went to a house of ill-fame, No. 5, Trinity Court, Aldersgate Street, and remained there a considerable time, and committed adultery; secondly, that, in the autumn of 1844, he contracted the venereal disease from intercourse with divers strange women.

Charge of adultery against the husband.

In support of the first charge, Henry Thorpe has been examined, who states that he lived six years in Trinity Court; that in the early part of 1844, No. 5 (the next door) "had all the appearance of a bad house;" that it was kept as a coffee-shop; that three females lived in it, but they had left it in April or May, 1844. His wife deposes to the same effect; she states that the three women left before the 9th of April, 1844, and that she does not believe there was a house of ill-fame in Trinity Court in May, 1844. Henry Piper, collector of the taxes for the last ten years, can safely depose that there was no house of ill-fame in Trinity Court in May, 1844. Another witness called to prove the charge, named Bishop, deposes that, towards the end of April or the beginning of May, 1844, he saw Mr. King go into a house, apparently of ill-fame, in Half-Moon Passage, Aldersgate Street, quite alone. Now, in the first place, this is clearly

MARCH 10. not the charge laid in the article, nor the charge counter-
King, v. King. pleaded by Mr. King. Independently of this, the witness
 Bishop has given his evidence in such a manner as to entitle
 him to no credit in the estimation of the Court.

Inference from This charge being disposed of, the proof of the adultery
his being dis- of the husband is limited to one issue, viz., the fact of his
eased : being infected with the venereal disease; and consequently
 it will be essential to enter into the details of the medical
 testimony both on the one side and on the other. But, be-
 fore I proceed to this, it may be useful to pause for a mo-
 ment, to consider the relative situation of the parties in the
 cause, as they stand before me at this stage of the inquiry.

It is an established fact in the cause (I assume), that the
 wife committed adultery with Charles Allen in April, 1844,
 —the date is material. It is equally clear, and established
 by the best evidence, his own admission, that Charles Allen
 was infected with the venereal disease in the summer and
 autumn of 1844. His own statement is, that he had the
 disease while Mr. King was at Margate, in 1844, but that
 he had nearly recovered from it in the October and Novem-
 ber of that year. The wife committed adultery in April,
 1844; the alleged adulterer had the disease in the summer
 and autumn of that year; and a third fact, placed beyond
 the reach of controversy, is, that Mr. King was infected
 with the venereal disease in December of the same year.

not conclusive Such being the state of the facts, it has been contended
where the wife by the Counsel for the wife, that the commission of adul-
had been un- tery is always to be presumed where the husband is infected
chaste. with the venereal disease. They have both pressed this as the
 received doctrine of the law applicable to all cases of this
 description. It seems to me, however, that they are not
 warranted in assuming this to be a proposition of universal
 application. It is very true that, when there is no aspersion
 upon the chastity of the wife, the venereal disease may
 furnish, and frequently does furnish, conclusive proof of
 the adultery of the husband. But, in the present instance,
 I am to consider the legal presumptions which apply to the
 case of an unchaste wife; and the real question is, what is
 the presumption of law, or rather, on which side rests the

burthen of proof, when the wife has placed herself, by her adulterous conduct, in such a situation that she may have been exposed to infection *abunde*, and may be the very individual who communicated the disease to her husband?

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Under such a contingency, I am of opinion that the burthen of proof is shifted; that the law will impose upon the wife the obligation of shewing that her husband contracted the disorder from the contamination of another person than herself; or, at all events, of proving that she could not herself have communicated the disease to him. Here the wife is adulterous; the paramour of the wife is infected, and there is no undue intimacy with any woman, or any circumstance leading up to adultery, proved against the husband, but the single fact of his being venereally infected.

The burthen of proof then shifted.

With these observations I approach the medical evidence.

The first witness (who has been examined by both parties) is Mr. John Miles, surgeon, a very excellent witness. Upon the 9th article of the wife's Libel he says, that on the 5th December, 1844, Mr. King called upon him and consulted him about some local inconvenience he suffered in the urethra; that the witness had his suspicions as to the nature of the disease, but did not tell him, nor when he came again, two days after, and not till the third visit, 9th December, when he told Mr. King he had contracted the gonorrhoea; that Mr. King exclaimed, "Impossible, for I have had no intercourse with any person but my wife," and seemed very much surprised and annoyed at the disclosure; that the witness said, if he was not satisfied, he had better take the opinion of another surgeon, and referred him to Mr. Aston Key. On the 10th article, he says he met Mr. Key at Mr. King's, and in consultation they fully agreed as to the nature of the disease. Upon interrogatory, he says that Mr. King, when the witness expressed his opinion, on the 9th December, that he had a venereal affection, expressed astonishment and surprise, and exclaimed, "Good God! it's impossible, for I have only been with my wife;" and the witness adds, "I believed his statement to be true, he expressed himself so strongly on the subject, and whenever I have seen him, he has always adhered to the same account."

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Mr. Miles, in his examination upon the husband's Allegation, deposes that, when he told Mr. King that his was a real case of gonorrhœa, he added, "to ease his mind," that "it was possible that he might have contracted the disease from a foul closet."

Mr. Aston Key, who has been examined by the wife, confirms Mr. Miles's evidence as to the nature of the disease, and states that the consultation took place on the 21st December, 1844.

Another witness examined by Mrs. King upon this point is Harriet Walden, who was servant to Mrs. King prior to her marriage, and continued to act as her servant up to about the last four months after her marriage, and attended upon both Mr. and Mrs. King, as a day-servant. She deposes that, about October or November, 1844, Mr. King was infected with the venereal disease, which she knew from the state of his linen; that she shewed one of his shirts to Mrs. King, who told her husband what the witness said, in the witness's presence; that both Mr. and Mrs. King positively denied that it could be the bad disorder; that a few days after, Mr. Aston Key being called in to attend Mr. King for an attack of the gout, after his second visit, Mrs. King informed the witness that Mr. King had the disease, as well as the gout; that he was confined up stairs for about three weeks, and on one occasion, whilst the witness was in the bedroom, Mr. King said, "This is a bad job, Harry;" the witness replied, "Yes, it is, Sir;" he then said, "I can't think how I got it, unless it was on a foul place, or closet." The witness adds: "He then walked across the room, and seemed very much cut up about it, took out his handkerchief, began to sob like a child, and said, 'So help me God! I have never known any other woman except your mistress since I married her.'" Upon interrogatory, she admits that, about the year 1844, she does not recollect it was in the autumn of that year; she pointed out to two other persons "the nasty, filthy state" in which Mrs. King's bodily-linen was.

Without attaching undue importance to the declarations

of Mr. King, (which are proved, however, by the witnesses of the wife), it is impossible not to see that they were spontaneous, and natural, and also that Mr. Miles himself was impressed with the notion of their sincerity, otherwise he would not have tried to soothe his feelings and allay his irritation, by suggesting the possibility of his having caught the disease by contact with some contaminated spot, in what he designates as "a foul closet."

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What, then, is the result of this scrutiny? The clear conviction that Mrs. King has failed to prove that Mr. King had connection with any other woman than herself; consequently, it is not a case where the *compensatio criminis*, which, undoubtedly forms part of the matrimonial law of these Courts,—is applicable; and such being the case, I am relieved from the necessity of wading through the disgusting details given by Eliza Nash and Ann Jones, other servants of this establishment, examined on behalf of Mr. King; of contrasting and comparing their testimony with that of Harriet Walden, and endeavouring to ascertain from such contrast and comparison whether Mrs. King was or was not infected with the disease; whether the physical infirmity under which she laboured was gonorrhœa or leucorrhœa, which, without the assistance of more medical evidence than I possess on this point, I should be extremely sorry to be obliged to decide. I am relieved from this by reason that Mrs. King has not done what the law requires, namely, shewn that Mr. King had been connected with strange women; for, being an adulteress herself, and her paramour being infected with the disease at the time, she is to shew that her husband had the disease *aliunde*.

Result: the wife has not shewn that the husband was infected *aliunde*.

I now come to the only remaining point, which was pressed by both the Counsel for the wife, namely, condonation and connivance on the part of the husband. It is said that the circumstances developed in the evidence prove connivance; that the husband must have known the conduct of his wife, and tacitly connived and winked at it, by allowing her to remain so long an inmate of his house after his discovery of her adultery. It is undoubtedly competent to the learned Counsel to use an argument of this kind; but they are met *in limine* by this difficulty: that, whereas they

Condonation and connivance

MARCH 10. had been contending that there was no adultery at all, they
King v. King. now contend that the adultery was so manifest that it was impossible it could escape the observation of the husband. This difficulty, however great, might be surmounted; but I am of opinion that it is not overcome in this case.

The husband is infected with the disease at the close of 1844; and it is proved beyond doubt that he had not the most remote suspicion of his wife's infidelity at that time. He doubts how he got it, and the notion infused into his mind by the medical adviser, in whom he confided, that he might have caught the disorder otherwise than from sexual intercourse, at a water-closet, naturally diverted his suspicion, and it was only when, in the progress of their guilty intercourse, the wife and her paramour became less guarded in their conduct, and were banded together against him in their domestic squabbles, that his suspicions became awakened, and his attention was directed to make inquiries. "*Dedecus ille domus sciat ultimus*," a well-known maxim, is as applicable (perhaps more applicable, from the prevalence of coarser manners) to the keeper of the *Black Swan* as to persons who are moving in an exalted sphere of life: and it is to be observed that, according to the plea of the wife it was the husband who turned her out of his doors at last.

not proved.

Under these circumstances, I do not think the plea of condonation or connivance made out.

Ante-nuptial
conduct of the
parties.

Great stress has been laid by the Counsel on both sides on the ante-nuptial frailties of both parties to this suit. It has been urged, in no measured language, by the Counsel for the husband, that the wife indulged in habits of profligacy and incontinence before their marriage, whilst the Counsel for the wife have endeavoured to direct my attention to the ante-nuptial adultery of the husband. I wish it to be understood that I have entirely dismissed from my consideration all the arguments connected with these respective accusations. In my judgment, the Ecclesiastical Court cannot be too cautious in abstaining from scrutinizing, or I should rather say, from all inquiry into, the conduct of married persons antecedent to marriage. If charges of this kind had been introduced into the pleadings on either side in this case, I should have directed them to be expunged

and I take this opportunity of stating, that I have decided this case solely *secundum allegata et probata*, and without any reference to facts which have found their way irregularly, as it appears to me, into the mass of evidence which I have been called upon to weigh and consider.

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In the course of the discussions in this suit, my attention has been frequently directed by the Counsel for the husband to the enormous expenses which have fallen upon him. I have no materials before me from which I can form any opinion as to the extent of those costs. It appeared, however, that the statement which had been suggested to the learned Counsel in the first instance was considerably overcharged. Be this as it may, I doubt not that the costs of the husband must be heavy; it is in the very nature of the suit that they should be so. In the first place, it is a matter of necessity that the husband pays the costs on both sides:—I say, a matter of necessity, because, in the contemplation of law, all the property of the wife becomes merged in the husband on marriage, so that if the wife had not pecuniary means afforded her from the resources of her husband, either to defend herself, or to prove her husband's connubial delinquency, there would be no end to the tyranny and oppression to which married females might be exposed and subjected; the law has, therefore, adopted this rule, under a choice of evils. It is fixed in the unalterable constitution of things that this privilege of the wife should be abused. No animosity is so bitter, none so rancorous, as that which is engendered between persons who have lived together in habits of unreserved intimacy and confidence, when the *consortium omnis vitæ* is suddenly broken up, and the bond of their affections violently rent asunder. Crimination leads to recrimination, and once arrayed against each other, they are too prone to catch at shadows, and to resort to loose and superficial proofs in the gratification of their revengeful feelings. The indulgence of such feelings leads to accumulated expense, and the Court can only interpose by expunging from the pleadings (as I shall always do) every fact which, not being pertinent to the immediate issue in the cause, may lead to the introduction of irrelevant matter, and

Expense incurred by the husband.

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King v. King.

by directing from time to time the costs to be taxed by the Registrar. If Mr. King is harassed by expenses in this matrimonial suit, he must regard it as one of the incidents to an unhappy marriage: a misfortune which he shares in common with many husbands, who have not been sufficiently prudent in selecting the partners for their lives.

Husband's
prayer pro-
nounced for.

Upon the whole, I pronounce that Mrs. King has failed in proving both the adultery and the cruelty with which she has charged her husband, and that she has not established any thing in his conduct to bar him from the remedy he prays.

Proctors :— *Townsend*, for the wife ; *Rothery*, for the husband.

Prerogative Court of Canterbury.

Cav. Day.

MARCH 16.

Where the testator, having been separated from his wife thirty-five years, without knowing whether she was dead or alive, married again, describing himself as a bachelor, and, six years after, made his will, bequeathing all his property to his second wife, but describing her as his housekeeper, and by her spinster name, —the Court refused to grant

IN THE GOODS OF THE REV. WILLIAM HALE, DEC — *Motion, ex-parte.*—The testator died in October, 1846. In early life, he married a person whose christened name was Elizabeth, but they quarrelled, and ceased to cohabit together, in 1802. Thirty-five years after, in 1837, a fact of marriage took place between him and Elizabeth B. he describing himself as a bachelor, and they cohabited together as husband and wife and were so reputed. In 1843, he gave instructions to his solicitor to prepare a will for him, stating his intention to leave all his property to the person who lived with him, but that he was afraid of describing her as his wife, lest his first wife, having the same christened name as E. B., might, if alive, claim the property. The solicitor, under these circumstances, described the party, named universal legatee and sole executrix, as the testator's "housekeeper," and under the name of E. B. The property was under £3,000.

Addams, Dr., moved for probate to E. B. by the name and description of "Elizabeth Hale, the widow and relict of the deceased, formerly E. B., spinster." The difficulty in the case is this: if she takes the grant as E. B., in the character of executrix, she will repudiate her marriage (which may be good), and have to pay ten per cent. legacy duty. On the other hand, the first wife may have been alive in 1837. The difficulty can only be effectually met by a special probate.

MARCH 16.

Hale, dec.

probate to her as widow and relict.

1846.

Dec. 3.

SIR H. JENNER FUST.—This is a peculiar case, and a very unfortunate one. It is clear that the testator was not satisfied as to the death of his first wife, for by the certificate of his marriage with E. B., he appears to have described himself as a bachelor, whereas, if he had been satisfied of her death, why should he not have described himself as a widower, and why should he have been afraid of representing E. B. as his wife in his will? How, then, can the Court take upon itself to say that this person was his lawful wife, when the testator doubted it himself? I am aware that the party, by taking the grant in any other character than widow, may repudiate her marriage; but what can I do? [*Addams*.—In a special probate all the circumstances will be recited.] I am asked to decree probate to this person as the widow. She is clearly entitled in some shape or other, as all the property is left to her; but the difficulty is for the Court to pronounce that she is the widow, and decree probate to her in that character. If I pronounce her to be lawful widow and relict, she will save the duty at the stamp office. [*Addams*.—If all the circumstances are stated, the Stamp Office will judge for itself.] I am not satisfied that the former wife is dead—the testator was not satisfied. [*Addams*.—Not in 1843.] I should be very glad if I could do it safely, but I do not see how I can grant the probate as prayed. Supposing the first wife to be alive, she would have no claim to the property. Let it be considered again.

The motion was renewed.

1847.
March 16.

MARCH 16.

Hale, dec.

Addams.—Very special advertisements have been in the newspapers, offering a large reward for the discovery of the existence or death of the first wife. She can be heard of, and her relations cannot be ascertained.

DECREE.

SIR H. JENNER FOSTER.—How can the Court say that a party is a widow and the widow of the deceased? I reject the motion. She must take probate as sole executrix named in the will.

Pownall, Proctor.

END OF HILARY TERM, AND OF THE SITTINGS
AFTER TERM.

Admission during the Term :—

AS PROCTOR.

Feb. 9.—DOUGLASS DU BOIS, Esq.

EASTER TERM, 1847.

Archies Court of Canterbury.

APRIL 15.

1st Sess.

THE COUNTESS OF DYSART v. THE EARL OF DYSART.— **Practice.**—
Notion.—This was originally a suit for restitution of conjugal rights, brought by the Earl of Dysart against his Countess, in the Consistory Court of London, the Judge of which Court, by his final Interlocutory Decree, ordered the Countess to return to cohabitation.* From this sentence the Countess appealed to this Court, and (as in the Court below) prayed a divorce by reason of the cruelty of her husband. The Dean of the Arches, by his final Interlocutory Decree, having the force and effect of a definitive sentence in writing, pronounced for the Appeal, reversed the Decree appealed from, and decreed the Countess of Dysart to be divorced from her husband by reason of his cruelty.† From this Decree the Proctor for the Earl of Dysart appealed *apud Acta* to the Judicial Committee of the Privy Council.

By the 107th Canon it is declared, that, “in all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the Act of the said sentence, that the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with other person: and for the better observation of this last clause, the sentence of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security with the Court that they will not any

Where a sentence of divorce had been pronounced, by interlocutory decree, before the bond directed by the Canon had been given, the Canon declaring a sentence contrary to such form to be void,—the Proctor for the adverse party having appealed from the sentence *apud Acta*, — the Court signed the same sentence, porrected in writing, after bond given.

* 3 Notes of Ca. 324. 1 Robert. 106.

† *Ante*, p. 194.

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*Dysart v.
Dysart.*

way break or transgress the said restraint or prohibition. And by the 108th Canon it is declared, that "if any Judge, giving sentence of divorce or separation, shall not fully keep and observe the premises, he shall be by the Archbishop of the Province, or by the Bishop of the Diocese, suspended from the exercise of his office for the space of a whole year, and the sentence of separation, so given contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced."

It is the invariable practice, in accordance with the Canons, for security to be given, in the form of a bond, before sentence of divorce *à thoro et mensis* is pronounced. In the present case, however, by inadvertence, such bond was entered into, on the part of Lady Dysart, prior to the sentence pronounced by the Judge of the Court on the 2nd March. A bond was subsequently entered into on her behalf, and notice was given by her Proctor the Proctor for Lord Dysart of his intention to put a definitive sentence in writing, divorcing Lady Dysart from her husband, and to move the Court by Counsel to the same.

ARGUMENT.

Sir John Dodson, Q.A., for the wife, in support of her motion.—There is no doubt of the power of this Court, which retained the principal cause, the parties being before it, to alter and vary its sentence, like other Courts. *The "Monarch."** *Cheese v. Scales.*† The Court of Chancery is perpetually altering its decrees. Here, however, we do not ask the Court to vary its judgment, but, in consequence of a want of form, to sign a sentence which has pronounced.

Haggard, Dr., on the same side.—It is almost *de jure* to sign the sentence now porrected. There are two modes of delivering the sentence of the Court, one by interlocutory; the other and more solemn mode, *in scriptis*, under the hand of the Court itself. The sentence was an Interlocutory Decree. *Lord Hardwicke*, in *Gallon v. Hall*.

* 1 Rob. jun. 21.

† 10 Mees. & W. 468.

cock,* totally varied a decree he had given twelve months before. In *Souter v. Souter*,† in the Prerogative Court, last term, an interlocutory sentence passed in favour of a will, and some formal step not having been taken, the Court repeated its sentence on a subsequent day.

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Addams, Dr., for the husband, against the motion.—No allusion has been made to the Canons, upon which the whole difficulty arises, and which declare that a bond shall be taken, and that, if a sentence of separation be given without such security, it “shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced.” This is said to be an Interlocutory Decree; but it has “the force and effect of a definitive sentence in writing.” It is, therefore, a definitive sentence, solemnly pronounced, recorded, and appealed from. According to the Canon, the sentence is void to all intents and purposes in law; but I am not to argue whether the sentence is null or not. If bad, it is a nullity, which cannot be cured; if good, the party has the benefit of the sentence, which is appealed, and the Court cannot pronounce another. Are there to be two sentences? In *Souter v. Souter*, the sentence was not recorded.

Harding, Dr., on the same side.—In *Souter v. Souter*, there was no appeal; the present question did not arise in that case. *Galton v. Hancock* was an ordinary case of altering a decree in the Court of Chancery. What was done by a Court of Law, in the record, in *Cheese v. Scales*, is no precedent for these Courts; that case proceeded on a distinct technical ground, applicable only to Courts of Record. In the “*Monarch*,” there was no question about an appeal, whereas our objection is, that what is asked cannot be done after an appeal *apud Acta*. So much as to authority; now as to principle. The effect of an appeal from an interlocutory sentence is to devolve the cause, and render the Judge *à quo* incompetent to do any thing with that cause. Gaill.‡ According to this writer, an appeal, even without an Inhibition, “extinguishes the sentence.” [PER

* 2 Atk. 430.

† Not. rep.

‡ Prac. Observ. t. ii. obs. 144.

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Dysart.*

CURIAM.—If an appeal is sufficient to extinguish the sentence, why is there any need of an Inhibition? In this case, there has been no petition for permission to appeal.] The same doctrine is held by Maranta,* Von Espen,† Ayliff,‡ and Oughton.§ It may be said that the Judge's hands are not tied up until an Inhibition issues; but in *Middleton v. Middleton*,|| Lord Stowell said that the Court would always defer to an appeal. Supposing, however, the Court to be against us so far, these objections arise. First, what would be the state of the process when the case comes before the superior Court? There would be two sentences in one cause, with different minutes,—an interlocutory sentence, entered on the day it was pronounced, and a definitive sentence in writing on a subsequent day. Secondly, how are we to prosecute our appeal, and know from which sentence we appeal? Thirdly, in a case of this kind, *prima impressionis*, there ought to be special grounds assigned for the application; there is no failure of justice; if there is an error, it has been through the *laches* of the other side. Fourthly, the consequences are serious: if the Court opens the door to such applications, it could not shut it again.

REPLY.

Sir J. Dodson, in reply.—The Canon justifies this application, for it declares that the sentence is “void to all intent and purposes of the law, as if it had not at all been given or pronounced.” If the sentence be a nullity, the Court has pronounced no sentence at all, only intimated its opinion, and we now ask it to sign a sentence. *Quidcunque videtur datum*, whether it is a nullity or not, the Court may sign the sentence, which can do no harm, since there can be no confusion as two sentences. If the sentence is a nullity, the appeal was a nullity. Most of the authorities put in front of the battle are foreign writers; Gaill, in particular, does not accord in all respects with the practice of the English Courts. In *Middleton v. Middleton*, though Lord Stowell says that the Court will pay deference to an appeal to the superior Court, yet he adds that the hands of the Court are

* Praxis, disp. 1, 38.

† Jus. Eccl. Univ. P. 3, tit. 10.

‡ Parerg. pp. 78, 79.

§ Ordo Judic. tit. 307.

|| 2 Hagg. E. R. Supp. 134.

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the original sentence,—pronouncing in favour of the appeal and for the divorce, and I shall, therefore, sign the sentence porrected on behalf of the Appellant.

(The Court, in the usual manner, before signing the sentence, called upon the Proctor for the Respondent.)

Stokes.—I have no Proxy from Lord Dysart, as my Proxy expired when I alleged an appeal on his behalf, on the 2nd March.

PER CURIAM.—You are still before the Court: you have appeared to-day, and instructed Counsel to oppose this motion.

Stokes.—I most respectfully decline to make any prayer on behalf of Lord Dysart.

Sir J. Dodson.—The Registrar might take down, “The Proctor for Lord Dysart being present, and declining to make any prayer.”

PER CURIAM.—The question is, whether the Proctor, having instructed Counsel, is not bound to make a prayer? He instructed Counsel, and prayed the Court to reject this motion; and then he turns round and says, “I make no prayer.” The question is, whether the Proctor is not bound, under penalty of suspension, to make a prayer?

Addams.—Mr. Stokes considers, as his Proxy has expired, he cannot do any act to prejudice Lord Dysart.

PER CURIAM.—I apprehend your Proxy did not expire as you say. The principal cause is not out of this Court until an Inhibition has issued, or a definitive sentence has passed.

Stokes.—A definitive sentence stands on the records of this Court, as already given.

PER CURIAM.—How do you appear here?

Stokes.—I may appear as *amicus curiæ*.

PER CURIAM.—This point must be considered. Mr Stokes must make a prayer, or, if he does not pray, it must be considered what is to be done.

(At a subsequent part of the day, the Court again asked the Proctor for Lord Dysart what he prayed?)

Stokes.—I most respectfully decline to make any prayer. I do not feel in a situation to do it.

Sir J. Dodson.—I should be sorry to press any thing against the Proctor, but as he has instructed Counsel, I cannot see how he can be before the Court, and not before the Court.

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Dysart.*

Stokes.—I submit that I cannot be compelled to do any act that would prejudice Lord Dysart, or any thing that I feel to be wrong.

PER CURIAM.—You come before the Court and instruct Counsel to resist the motion to sign the sentence; and you now decline to make any prayer. That, I think, is not right, Mr. Stokes. You had appealed, and that must appear on the records of the Court; the only doubt I have is, whether I should not have that inserted in the sentence.

Stokes.—I am afraid of perempting an appeal.

PER CURIAM.—It may be a question whether you have not done so already. The Court's hands are not tied, and Mr. Stokes has appeared as Lord Dysart's Proctor.

Stokes.—Under a Proxy which only lasted till a definitive sentence.

The Registrar.—The minute I proposed to make is, "Present Stokes, who objected thereto."

Addams.—That is, to signing the definitive sentence.

Stokes.—I have no objection to these words being inserted: "Stokes objecting to such sentence being so signed."

(The Court inserted those words with its own hand, and signed the sentence.) Sentence signed.

Proctors:—*Orme*, for the Appellant; *Stokes*, for the Respondent.

(The suit was soon after compromised.)

ORME v. HOLLOWAY, FALSELY CALLING HERSELF ORME. Nullity of marriage by reason of undue publication of Banns (brought by Letters of Request from the Court of Worcester), promoted by William Orme, the father, and as such the natural guardian, of William Wheeley Orme, a minor, against Harriet Holloway, spinster, alleging herself to be the wife of the said William Wheeley of the fraud.—

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*Orme v.
Holloway.*

It is not necessary that there should be positive and direct proof that the false publication was with a view to fraud; but there must be evidence of concert between the parties.

Orme. The Libel pleaded the Act 4 Geo. 4, c. 76; the birth of the man, on the 23rd August, 1827, and that he was baptized by the name of "William Wheeley;" that he constantly used and was addressed by both such Christian names, on purpose, amongst other reasons, to distinguish him from his father; that such fact was well known by the other party, Harriet Holloway, who, being a servant in the family of Mr. Orme, had charge of the linen of William Wheeley Orme, the articles of which were marked "W. W. Orme;" that letters were addressed to him by those names which were frequently taken in and delivered to him by Harriet Holloway, and he wrote letters to her which were so subscribed; that Harriet Holloway was the illegitimate child of one Mary Ann Spittle, spinster, afterwards (in 1823) married to one Benjamin Holloway, since which she (Harriet) always passed by the name of Holloway, and no other; that in April, 1845, William Orme, the Promoter (a coalmaster and manufacturer of spades and shovels at Stourbridge, Worcesterhire), engaged Harriet Holloway, then aged twenty-four, as a housemaid, in which capacity she resided in his house until the 9th March, 1846, when she quitted his service, and went to lodge at the house of Thomas Halls, at Old Swinford, Worcestershire; that Harriet Holloway, acting in concert with William Wheeley Orme for the purpose of effecting a marriage between them, without the knowledge and in fraud of the rights of him (the father), caused the Banns of marriage to be published between them in the parish church of Clent, in the county of Stafford (four miles from Stourbridge and three miles from Old Swinford), on the 21st and 28th June and 5th July 1846, under the false names of "William Orme" and "Harriet Spittle;" that, in pursuance of the Banns so unduly published, a fact of marriage took place between the parties on the 6th July, 1846, in the parish church of Clent, the man representing himself on that occasion, in the hearing of Harriet Holloway, as William Orme, by trade a barber; the son of William Orme, a carpenter, and as of the age of twenty-one years and upwards, and Harriet Holloway representing herself, in the hearing of William Wheeley Orme.

as Harriet Spittle, daughter of Benjamin Spittle, a blacksmith, and the parties respectively subscribed such names in the Banns-Book ; that, immediately after the ceremony, the parties separated, the man returning to his father's house at Stourbridge, the woman to her lodgings at Old Swinford ; and that, on the 27th July, 1846, the father of the man received information which led to the discovery of the marriage.

Seventeen witnesses were examined upon the Libel, and interrogated on the part of the wife, who gave no plea.

The evidence in support of the Libel proved that William Wheeley Orme was baptized by those Christian names ; that his letters were addressed "W. W. Orme," and his linen was marked with the same initials, both which facts were known to the other party, Harriet Holloway, who had been a servant in the family ; that she was the illegitimate daughter of a woman named Spittle, who, about two years after her birth, married one Holloway, supposed to be the father of the child, who, after that time, was called and known by the name of Holloway ; that she gave a paper with the names of herself, as "Harriet Spittle," and of "William Orme," written upon it, in her (Holloway's) handwriting, to Mrs. Hall, at whose house she lodged, for her husband to take to the parish clerk of Clent, telling her at the time that it was the wish of W. W. Orme that the name "Wheeley" should be left out of the paper ; that Hall, the husband, took the paper to the parish clerk of Clent, to have the Banns published ; that the parish clerk, upon receiving the paper, directed his son to enter the names in the Banns-Book, and the Banns were published as entered there upon the days mentioned in the Libel. The Vicar of Clent deposed that, in pursuance of the Banns so published, he married the parties ; that, immediately previous to the commencement of the marriage ceremony, he asked them, in the presence of each other, their Christian and surnames ; that the man answered "William Orme," and the woman "Harriet Spittle ;" that, immediately after the ceremony, he and they went with their friends into the vestry, when, in answer to his (deponent's) questions, he again said his name was "William Orme ;" that he was of

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full age; that he was a barber, and his father a carpenter, all in the presence and hearing of the woman, who, in the presence and hearing of the man, in answer to the deponent's questions, said her name was Harriet Spittle; that her father's name was Benjamin Spittle, and that he was a blacksmith.

ARGUMENT.

Addams, Dr., for the party promoting the suit.—The evidence clearly shews that the false publication of the Banns was wilful on the part of both parties. It is a stronger case than *Tongue v. Allen*.*

R. Phillimore, Dr., on the same side, cited *Pouget v. Tomkins*,† *Sullivan v. Sullivan*,‡ and *Wilson v. Brockley*.§

Haggard, Dr., for the wife.—The father of the husband is suing in this case to vindicate his own rights against a fraud; he is therefore bound to prove his case fully and completely. The wife is spoken of as a virtuous woman, and there is nothing to shew that the suit has been instituted by the wish of the husband, and that, when he attains his majority, he will not adhere to the marriage, and there may be issue whose rights will be affected. The woman's original name was Spittle, and she may have reverted to that name under a misconception of what her true name was; it may be an error, but it is no fraud. There is no matter more difficult than to say what is the legal name of an illegitimate person. With respect to the husband's name of Wheeley, it is not proved that that name was in ordinary use; the Libel pleads that he was constantly addressed by both Christian names, on purpose, *inter alia*, to distinguish him from his father; but this is disproved by the servant, his uncle and his aunt, who say that he was called "Will," or "Willy," or "William." The suppression of the second baptismal name is too slight a circumstance.

Jenner, Dr., on the same side.—In *Tongue v. Allen*, the name, "*Croxall*," omitted, was the ordinary name of the husband, who was never known by the name of "*Edward*;" and in *Breaty v. Reed*,|| the name of "*Robert*," by which

* 1 Curt. 38. 1 Moore, P.C.C. 90.

† 2 Hagg. C.R. 142.

‡ *Ibid.* 238.

§ 1 Phill. 132.

|| 1 Notes of Ca. 121. 2 Curt. 633.

the man was described, had been disused, and his usual name of "Charles" was suppressed.

Addams and R. Phillimore, in reply.—The rule laid down in *Tongue v. Allen* is, that you must look at all the circumstances to see whether the omission of a Christian name was for the purpose of fraud, and with the cognizance of both the parties.

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SIR H. JENNER FURT.—In this case the Court can enter Judgment. In no doubt of what the result must be, though the proof might have been made more strong by the production of the letters. I think it is impossible for the Court not to hold that the marriage is null and void under the Act of Parliament.

The construction of this Act is, that, in order to set aside a marriage on the ground of undue publication of the Banns, it is necessary for both the parties to be cognizant of the fraud;—it is necessary, first, to prove that there has been a fraud, and secondly, that both parties were cognizant of the fraud, and knowingly and wilfully intermarried without due publication of Banns.

The first question is, as to the fact of the marriage, of which there is no doubt: it is proved by the clergyman who officiated at the time of the marriage, and by Thomas Halls, who was present at the marriage, and there can be no doubt of this fact.

The next point is likewise proved beyond all doubt, namely, that the Banns were published in the names of "William Orme" only, the name of "Wheley," one of his baptismal names, being omitted in the publication of the Banns.

It is proved, in the third place, that in the publication of the Banns, the wife was described by a wrong name also, as she was described as "Harriet Spittle," whereas she was known as "Harriet Holloway."

These facts are necessary to be established to enable the Court to come to a conclusion as to the effect of the evidence in the cause. That the husband's name of "Wheley" was omitted is not denied, and the question is, whether both

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the parties were cognizant of this omission in the first instance? That the woman was cognizant there can be no doubt, as she declared to Mrs. Halls that the name of "Wheeley" was left out by desire of her husband, which shews that it was done with her knowledge and for the purpose of concealment; she told Mrs. Halls that her husband wished that that name should be omitted in the publication of the Banns. There may be some doubt whether the declaration of the woman would be evidence against the man; but though it may be no direct evidence, it is part of the *res gesta*, and if the parties were conspirators, it may be doubtful whether the declaration of one of the conspirators might not be evidence against another. At all events, it is evidence against herself. But, independent of this declaration, there is a circumstance which shews the knowledge of the omission of the name by the husband, in his adoption of the Banns at the time of the marriage, for he answered to the name of "William Orme" at that time, and was married by the name of "William Orme," and he signed that name in the Banns-Book; and therefore he expressly adopted the Banns (as in the case of *Tongue v. Allen*), and he concurred, therefore, in the publication of the Banns in the name of "William Orme" only, the name of "Wheeley" being omitted.

Again, there can be no doubt that the marriage was a clandestine proceeding. What are the facts? The parties had resided in the same house; the husband lived with his father, and Harriet Holloway had been a servant in the family, residing in the house, conducting herself undoubtedly in a proper manner, and it would appear that she bore an irreproachable character, so much so, that, although she twice gave notice of her desire to leave, she was twice induced to remain by the entreaties of the mother of the husband. After leaving the father's house, she went to lodge with a Mr. and Mrs. Halls, on the 10th March, 1846, and there she was frequently visited by this young man, and they go from this house of the Halls to be married. Mrs. Halls at least knew the fact of "William Orme" not being the true name, and Halls says that, at the time of

the marriage, though no specific inquiry was made as to whether the husband had any other name, he was called "William Orme," and asked whether his name was "William Orme," and he said "Yes," and presented himself as "William Orme," though it is clear that he was in the habit of signing his name "W. W. Orme:" so that the omission of the second baptismal name in his presence goes very strongly to shew that he was cognizant of the fact of that name being omitted, and it could be for no other purpose than to conceal the identity of "William Orme" with "William Wheeley Orme," the son of William Orme. It appears in evidence that his linen (his stockings, at least) was marked "W. W. Orme," and that Holloway had the care of his linen, and that "W. W. Orme" was upon the letters addressed to him, to distinguish him from his father, which letters were sometimes taken in by her. Therefore, there can be no doubt that she knew his second name was omitted, and from her declaration to Mrs. Halls that she knew the name was "Wheeley."

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After the ceremony of marriage, the parties separated at the church-door; she came back to Halls' house, and he returned to his father's house.

There is a circumstance which connects itself with the omission of the name of "Wheeley," viz. that it is a peculiar name,—known, not only to all the family, but to persons in the neighbourhood, being the family name of his mother. All these circumstances together are very strong proof of fraud and concealment on the part of these two persons, as to the undue publication of the Banns, so as to affect both parties with a knowledge of their undue publication, and that it was with a view to and for the purpose of fraud. It is not necessary to have positive and direct proof of this fact, for if so, no case could ever be brought home to the parties. Here all the circumstances combine, and shew that the parties were in concert together, and the parties had resided in the same house, so that there was a facility for preconcert. I have, therefore, no doubt of the nullity of this marriage on the ground of the omission of the name,—though I agree that every omission of a Christian name

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which the party was not in the habit of using, is not a ground of nullity; but here it was done for the purpose of concealing the identity of the party.

With regard to Harriet Holloway, there can be no doubt that she was cognizant of the name of "Spittle" being a different name from that which she was usually known by. There is no doubt that she was the illegitimate daughter of a woman named Mary Ann Spittle, and that, about a year and a half after her birth, her mother married a man named Holloway, and that that was the name by which the woman (Harriet Holloway) was afterwards known; and she was married by the name of Spittle, and not by that of Holloway, by which she was known. Supposing there was no other difference in this case, and the woman had been married by the name of "Spittle," without any apparent motive for using that name instead of "Holloway," the Court might have some doubt whether this would be sufficient to annul the marriage. But what are the facts? She had been known by the name of Harriet Holloway in the family of Mr. Orme; and not only so, there had been some suspicion entertained by the mother, or on the part of the father and mother, of Mr. Orme, that there was some connection between the parties, or that their son had an affection for the young woman. Why, if the publication of the Banns had been as between "William Orme and Harriet Holloway," there might have been some person present who would have given information to the parents of Mr. Orme; but the name of "Harriet Spittle" being used, they would know nothing from that. The name of "Harriet Holloway" would have created a greater degree of suspicion in their minds, though the name of "Wheeley" was omitted, as Harriet Holloway had lived in the family of Mr. Orme as a servant. So that there was some motive in this case for the use of a different name, and it is not like the case of *Sullivan v. Sullivan*.* That was a case in which another name, by which the party had not been known, was added to her name by which she had been known,

* 2 Hagg. C. R. 238.

he name interposed being her mother's name, the party being legitimate. That was quite a different case. Of the first and the second surnames, "Holmes" and "Oldacre," the second was the most emphatically marked: "Oldacre" was marked name; "Holmes," the name added, was not so. But there was no motive in that case to conceal or disguise the name of the woman; but there is a motive for disguise here, as the name of "Holloway" was known to the parents, and there was a suspicion on their part that their son and the woman were attached to each other. So that, under these circumstances, I have no doubt of the conclusion to which the Court is bound to come. The proceeding was carried on in a clandestine manner, without all controversy; the parties had a motive to conceal the marriage, and a motive to omit the peculiar baptismal name of the husband; for, being peculiar, the name itself would have directed the attention of persons present at the publication of the Banns: and I have no doubt that the name of the other party was employed for the purpose of concealment. Though, possibly, a name acquired by an illegitimate person by reputation may supersede the original name, yet the use of the original name may not be sufficient alone to annul a marriage, without a motive for disguise; but where there is a motive, and it is not done from whim or caprice (there was a case of that kind before Lord Stowell), it is important.

Looking at the whole of the case, and at the general result of the circumstances, all of which tend to shew that both parties were cognizant of the fact of the publication of the Banns in these names, I have no doubt that it was for the purpose of concealment; and if so, I say it was an undue publication of the Banns, and being so, with the knowledge of both parties, they knowingly and wilfully intermarried without due publication of Banns, and, according to the Act of Parliament, such a marriage is null and void; and I therefore pronounce a sentence annulling this marriage.

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Both parties
cognizant of the
fraud.

Marriage
annulled.

Proctors:—*Deacon*, for the Promoter; *Thomas*, for the woman.

High Court of Admiralty.

1st Sess.

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Collision.— **THE "TEST."**—*Cause, by Petition.*—This was an action where, by neglect of the Trinity House Rule, on the part of a vessel bound to give way to another vessel, the latter was run down, it cannot be set up in defence that this vessel might have avoided the collision by disobeying the Rule.

THE "TEST."—*Cause, by Petition.*—This was an action by the owners of the brig *Mayflower*, of Shields, which was sunk by a collision with the vessel proceeded against, on the morning of the 20th November, in Robin Hood's Bay, on the Yorkshire coast, when the whole of the crew on board the brig lost their lives. Both vessels had left Seaham the preceding day, and were bound to the southward, the wind blowing hard from that point. Both were close-hauled at the time, the *Mayflower* on the starboard tack, the *Test* on the larboard tack, in which state of things the rule of navigation required that the *Test* should give way, and the *Mayflower* keep her course; the latter observed the rule, but it was alleged on the part of the *Test* that, when the necessity for bearing away occurred, there was not time to wear or stay.

THE COURT was assisted by Trinity Masters.*

ARGUMENT.

Addams and Robinson, Drs., for the *Mayflower*, submitted that it was a clear case of violation of the Trinity House Rule: citing *The "Anne and Jane,"*† and *The "Traveller."*‡

Bayford, Dr., for the *Test*.—The owners of the *Mayflower* have not made out their case. There was not a sufficient look-out on board that vessel.

Deane, Dr., on the same side.—There are two questions in this case; first, whether the *Test*, at the time when she first saw the *Mayflower*, was in a position to wear or stay, which is a nautical question resting with the Trinity Masters. The second question is of much greater importance, namely, supposing the *Test* could or could not have altered her course, whether the *Mayflower* was justified in holding her reach to the last moment. Is the fault of one man

* Captain Wellbank and Captain Pixley.

† 2 Rob. jun. 98.

‡ *Ibid.* 197. 2 Notes of Ca. 476.

however great, to dispense with care and caution on the side of the other party? In running-down cases on land, it is not sufficient for one party to say merely, "I was on the right side of the road." So on sea, the party complaining should shew that he was not at all to blame. *The "Serengapatam."**

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Test.

DR. LUSHINGTON (*addressing the Trinity Masters*).—SUMMING UP.

Gentlemen: These two vessels were both bound to the southward; the *Mayflower* was on the starboard tack, and the *Test* on the larboard tack. Both were closehauled, and, according to the established rule, it was the duty of the *Test* to have given way, if she had the power of so doing. In the pleadings, on the part of the *Test*, it is not denied that this was her duty; but she says it was not possible for her to do so, for that she was unable either to wear or stay. As relates to the *Test*, the question, whether she is liable or not, will depend upon the opinion you shall form, as to whether the excuse she makes for not obeying the rule is valid or not. She gives you no reason; it is a simple averment.

Now let us look at the circumstances of the case. The collision takes place about half-past six on the morning of the 20th of November, and it is admitted, on the part of the *Test*, that she saw the *Mayflower* at the distance of a quarter of a mile; then the mate called up the master and the crew, who were below, and they hailed the other vessel to give way, it not being the duty of the *Mayflower* to give way, under ordinary circumstances, such as those here described. It is not represented that it was a dark night, or that there was any particular reason which prevented the *Test* from seeing the *Mayflower* in due time. As far as relates to the *Test*, I submit it to your better judgment whether you think that such an excuse—which must be established by evidence, and not be simply averred—is valid or not.

With regard to the *Mayflower*, an argument was raised

* *Ante*, 61.

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by Dr. Deane, that even supposing the *Test* to have been to blame, the *Mayflower* was also to blame, because she might have avoided the collision if she would; and it is a principle of law that you are not to adhere to strict rules of navigation, but avoid an accident if possible. That is a doctrine, however, to be very carefully watched. I do not mean to say that any vessel is justified in coming into collision with another if she can escape it, because common sense and common regard to property and life establish an universal principle, that no persons must wilfully come into collision with another vessel. But it would be a dangerous doctrine to hold, without evidence, that the *Mayflower*, whose duty it was to keep her course, ought to have deviated from that rule, and given way, where there are no circumstances established by evidence to shew that she ought so to have done. I cannot conceive that any thing would be more likely to lead to mischievous consequences, than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequence would be, that there would be no certainty; whereas, the doctrine I have upheld, supported by your authority, is, that, in cases of this description, you ought always to follow the general rule. The certainty which results from an adherence to general rules is, in my opinion, absolutely essential to the safety of navigation. I think I am bound to tell you my opinion. I see no excuse on the part of the *Test*, and no reason to impute any blame to the *Mayflower*.

OPINION.

CAPTAIN WELLBANK.—We are obliged to decide this case on the evidence of the *Test* alone. The *Test* was on the larboard tack, and she acknowledges that she saw the *Mayflower* a quarter of a mile distant. It was a fresh wind, and she could readily have answered the helm. If the master of the *Test* had put up the helm at the moment he first saw the *Mayflower*, she had time to wear. A quarter of a mile is 440 yards; supposing that both vessels moved at the same speed, each had 220 yards to run. It is true that laden colliers are sluggish in wearing; they should, there-

fore, be prompt, and attempt it in due time. The *Test* did not do so, and consequently is in fault.

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Test.

PER CURIAM.—I pronounce for the damage, with costs.

Proctors:—*Stokes*, for the *Mayflower*; *Burchett*, for the *Test*.

THE "EFFORT."—*Cause, by Petition.*—This was an Collision.—
action by the owners of the steam-tug *Dragon* against the Where a steam-
schooner *Effort* for the loss of the former vessel in conse- tug was run
quence of a collision on the 22nd April, 1846, off the Bute down by a sail-
Dock, Cardiff. Between two and three o'clock in the after- ing-vessel, in
noon of that day, the steam-tug, belonging to Cardiff, was a narrow cut,
engaged in the Cutway, picking up a buoy, when the leading to a
schooner, with a pilot on board, entered the Cutway, and dock, navigable
struck the steam-tug, which sank. only at a parti-
cular period of
the tide, at
which period
the collision oc-
curred; the tug,
proceeding in
an opposite di-
rection, held to
be to blame.

The Court was assisted by the same Trinity Masters as in the preceding case.

Addams and *Deane*, Drs., for the *Dragon*; *Bayford* and *Twiss*, Drs., for the *Effort*.

DR. LUSHINGTON (*addressing the Trinity Masters*).—SUMMING UP.
Gentlemen: Several questions arise in this case for your
decision, for you will have to determine, not only whether
the *Effort* is to blame, but also whether the steam-tug
was to blame also.

This collision took place in daylight, about 2 p.m., on the
22nd of April, at the entrance of the Bute Dock, at Cardiff.
It is very probable that many considerations may suggest
themselves to your mind, with reference to the locality, which
I cannot pretend to form any judgment upon at all; but I
am desirous, in the first instance, of calling your attention
to the statement on behalf of the *Dragon*, for two pur-
poses, asking your opinion whether, taking that statement
as true, the *Dragon* did right, and the *Effort* did wrong.
The steamer's account is briefly this:—That the wind was
E. by S. to E.S.E.; that there was no room for the tug to
pass to the leeward of the *Effort*, and they, therefore, star-

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boarded the helm, putting it up to the windward, close to the mud-bank on the east side. It will be for you to determine whether they were right in so starboarding the helm, and putting it to windward close to the mud-bank on the east side: that will depend on whether there is room to pass to the leeward or not, a point on which I can form no opinion. That is the first question. With regard to the *Effort*, it is alleged, on behalf of the steamer, that the helm of the *Effort* was starboarded also; that this was so done by the orders of Davis, who was on board, and had the charge of conducting the navigation of the vessel; that the helm was changed by the order of the master, and was put to port, and again to the starboard, by Davis's orders. If this statement be true, the helm of the *Effort* was changed no less than three times; and certainly it occurs to me, as a person pretending to no particular nautical knowledge, that that could not be a right course of proceeding.

The case of the *Effort* is this. She states that she was entering the harbour, the course of the channel leading to the dock lying N.N.E.; that she kept her head N.E. by N., hugging the weather side of the channel; that the steamer was coming down channel, on the lee-bow of the schooner; that she hailed the steamer to go to leeward; that there was ample room, but nothing was done till the two vessels were too close, when the steamer's helm was suddenly put to starboard. You will observe that these statements are directly at variance in some respects, but not in all. They are not at variance as to what was actually done by the steamer, but as to the time; for they both agree that the helm of the steamer was starboarded. It is further stated on behalf of the *Effort*, that Davis did order the helm to be starboarded; that it was done for a moment only, not long enough for the schooner's head to begin to pay off; that the two vessels were then so close that the collision was inevitable, and the schooner's helm was put hard down. The excuse, therefore, you perceive, for starboarding the helm was, that it was done by Davis's orders; still, whether it was a right or wrong measure, they say it produced no effect, and was not the cause, or even part of the cause, of

the collision, which, they say, was inevitable, and no blame was attached to either party.

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The questions, as it appears to me, resolve themselves, in the end, to this. Was the steamer to blame for not giving way? was the excuse of want of room true or not? and, ought the steamer to have been where she was at the time, under the circumstances? So much as relates to the conduct of the steamer. As relates to the *Effort*, it must depend on your belief of one of two contradictory statements. If you believe that she first starboarded her helm, then put it to port, and then starboarded it again, it would appear, in my judgment, she acted erroneously; if, on the other hand, you believe that she only altered the helm for a moment, and it produced no effect in causing this collision, then no blame attaches to her.

CAPTAIN WELLBANK.—This case cannot be judged of *OPINION*. by the rules laid down for nautical practice. The collision took place in a cut leading to the Bute Dock. The tide was about half-flood; a signal was made for vessels to enter, and the *Effort* had passed the outer buoy. This cut is very narrow; if the statement be correct, it is not above 165 feet. It is merely a deepened channel through a mud-bank. At low water the bank is dry, and it is not navigable till half-flood. The tug placed herself in jeopardy by choosing too early a period of the tide, when vessels were coming up, which she ought not to have done. Sailing vessels ought not to be subjected to obstructions which might cause collision, after the signal is made to enter. There is no blame attaching to the schooner. If the steam-tug, drawing less water than the schooner, could not go to the leeward, how could the *Effort*, drawing a greater depth of water? The steam-tug was entirely to blame; she ought not to have entered the channel at that period of the tide. The tug alone to blame.

PER CURIAM.—I pronounce against the claim, with JUDGMENT costs.

Proctors:—*Addams*, for the *Dragon*; *Bathurst*, for the *Effort*.

APRIL 16. THE "GIPSEY KING."—*Cause, by Act on Petition.*

Collision.—Where a vessel, the last of three vessels in tow of a steamer, the vessel towed being in charge of a duly-licensed pilot, came in contact with and damaged another vessel riding at single anchor in the river Clyde, in the deep channel, the *Trinity Masters* being of opinion that there was plenty of room for the three vessels to pass the vessel at anchor, and that this vessel had not her anchor improperly laid:—Held, that, although the vessel towed was to blame, the collision being attributable to the swinging of the string of vessels out of the straight line, which was owing to the improper steering of the last vessel, this was the fault of the pilot alone, and that the owners were exonerated.

The *Highlander*, a small vessel of 119 tons, with a cargo pig-iron, on a voyage from Glasgow to Rotterdam, having a river pilot (not a duly-licensed pilot) on board, about half past three o'clock P.M., of the 25th April, 1846, the tug being very far gone, took the ground on the N. side of the river Clyde, near Dumbarton Castle. In the evening she floated again, but there not being wind enough to enable her to make sail against the current, by direction of the pilot, her small bower anchor was let go, and she rode (being moored) towards the north side of the channel. Whilst the *Highlander* was in this position, about ten o'clock at night, the schooner *Gipsy King*, of 217 tons, from Liverpool, at Glasgow, deeply laden with a general cargo, drawing fourteen feet water, was coming up the Clyde, in charge of a duly-licensed pilot, taken on board under compulsion of the statutes and rules regulating the navigation of the river, towed, along with two other vessels, by the *Gulliver* steamer, the *Gipsy King* being the last of the vessels in tow. On the part of the *Gipsy King*, it was alleged that the pilot on board the *Gulliver*, the towing vessel, seeing the *Highlander* anchored in the deepened channel, hailed her to get away her chain and shift her helm; but that no notice was taken of the hail, and the anchor of the *Gipsy King* caught the chain cable of the *Highlander*, came in contact with the rudder, and did the damage which was the subject of the action. It was further alleged that, by the 63rd of the *Bills of Laws for the River Clyde*, it was ordered that vessels should not lie at anchor in the deepened channel, unless it was absolutely necessary, and should leave it as soon as they could; and that, whilst there, they should so anchor as to prevent a free passage for other vessels. The owners of the *Highlander* alleged that there was sufficient room when she was anchored for other vessels to pass, and that the blame of the collision was attributable to the *Gipsy King*, the owners of which imputed the accident to the improper position taken up by the *Highlander*, which had abundant time to get out of the way.

The Court was assisted by Trinity Masters.*

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Sir John Dodson, Q.A., and Robinson, Dr., for the Gipsy King. Addams and Jenner, Drs., for the Highlander, Feb. 20.
stopped by the Court.

DR. LUSHINGTON (*addressing the Trinity Masters*).—SUMMING UP.

Gentlemen : The vessel, the owners of which are proceeding in this case, was lying at anchor, and I have laid it down before, and now repeat it, that if, under these circumstances, any other vessel runs against such a vessel, and does her damage, the burthen of proof lies on the vessel doing the damage, to exonerate herself, by shewing that it was not her fault, and for this obvious and plain reason,—a vessel at anchor cannot take measures to prevent a collision. Of course that burthen of proof may be discharged, either by shewing that it was so dark that it was impossible to see the other vessel ; or that there was a tempest or hurricane, which made the vessel doing the damage unmanageable ; or other circumstances of extenuation. But, I repeat, a vessel doing damage to another vessel at anchor is bound to prove her excuse, if she has one, and the burthen of proof is not upon the other vessel. I should be exceedingly sorry to hurry you to a determination in this or any other case ; and therefore, if you entertain the slightest doubt as to the questions I put to you, we must adjourn the case to another day. I am not about to put to you any questions of law, but questions on matters of fact, in connection with nautical science and the locality of the collision.

The questions are these : 1st, Whether the *Gipsy King* Questions. had not room enough to have avoided the collision if she had been properly and carefully navigated ; 2nd, Whether the *Highlander* had her anchor improperly laid in the deep channel ?

CAPTAIN WELLBANK.—We are of opinion that there OPINION. was plenty of room for the three vessels to pass : but they were all in a line, at a considerable distance from each other, and, like the long tail of a kite, the last might wave from the

* Captain Wellbank and Captain Bax.

APRIL 16. straight line. I attribute the accident solely to that cause—
Gipsy King. The next question is, whether the *Highlander* had her anchor improperly laid. It appears from the evidence that the *Highlander* had been ashore, and had been got afloat into deep water, and it is usual, under such circumstances, to lie a tide or two at single anchor, without being moored. If she had so lain any length of time, she might be in error; but it does not appear that she had. We therefore think the *Highlander* entirely free from blame.

PER CURIAM.—There remains a point of law, which we will discuss on the 22nd.

Feb. 22.
 ARGUMENT.

Sir John Dodson.—The opinion of the Trinity Masters exonerated the *Highlander* from blame; but I am not clear whether they imputed directly blame to the *Gipsy King*. [PER CURIAM.—I asked the Trinity Masters whether there was not room for the *Gipsy King* to pass, and they said that, the vessels being all in a line, with an interval between each, the third vessel (the *Gipsy King*) could not keep her course so directly as a single vessel could have done, and the damage arose in consequence of that. They did not in terms say that she was to blame.] I presume I must argue the case as if they imputed a certain degree of blame to the *Gipsy King* and none to the *Highlander*. Then the question is, whether the owners are not exonerated by reason of a duly-licensed pilot being on board and in charge of the vessel, taken compulsorily, his orders having been obeyed by the crew. These facts are proved, the compulsion by the 60th section of the Bye-Laws, framed under the Act (local, but to be deemed public) 3 & 4 Vict. c. 118, sec. 84, and 6 Geo. 4, c. 117. [PER CURIAM.—I should like to have that point distinctly argued—whether the taking was compulsory.] The Court has decided that, independently of the provisions of the General Pilot Act,* on general principles, a pilot taken on board under a local Act is compulsorily taken. *The "Maria."*† *The "George."*‡

* 6 Geo. 4, c. 125.

† 1 Rob. jun. 95.

‡ 4 Notes of Ca. 161.

Robinson, on the same side.—The Trinity Masters said that the accident was attributable solely to the swinging of the string of vessels to and fro “like the tail of a kite,” which was caused by the act of the pilot. [Cited in addition *The “Agricola.”**]

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Gipsy King.

Addams.—I never meant to contend that, if the taking of the pilot was compulsory, and the fault of the collision lay with the pilot alone, the owners were not exempted. I do not deny, in this case, that the taking of the pilot might be compulsory; but the question is, whether the collision was occasioned by the fault of the pilot solely. There is not the evidence which the Court has a right to expect, that the orders of the pilot were duly obeyed; there is no protest of the *Gipsy King*, nor any affidavit from the pilot, who, though now dead, lived long enough to make one. We allege that an anchor of the *Gipsy King* was not lying on the deck, or carried in the usual manner, but was hanging over her bows, which caused the accident, the fluke of the anchor being driven into the bow of the *Highlander*, under water, which would not have happened if the anchor had been “catted” in the proper way. [PER CURIAM.—Suppose the collision arose entirely from the anchor being improperly carried, how would the legal liability rest?] According to whether it was or was not the pilot’s duty to see that the anchor was in a proper place. I contend it is the duty of the master and crew. [PER CURIAM.—The Trinity Masters’ view of the case from the first was, that the *Gipsy King* was out of her proper course; that she ought to have been farther away from the channel, and that the real cause of the accident was her proximity to the *Highlander*.] Supposing it to be so, the accident, nevertheless, would not have occurred if the anchor of the *Gipsy King* had not been improperly “catted.” In *The “Diana,”*† it was held that, although a pilot was on board the vessel doing the damage, the blame was not to be imputed to him, and the owners were made responsible.

Jenner, on the same side.—Assuming the too great

* 2 Rob. jun. 10. 2 Notes of Ca. 113.

† 1 Rob. jun. 131. 1 Notes of Ca. 357. 4 Moo. P. C. C. 11.

APRIL 16. *Gipsy King*. proximity of the two vessels was the cause of the collision, it was not the only cause of the damage; and assuming the pilot to be in fault for that proximity, still the master and crew are not wholly exonerated from blame in respect to the anchor, which is necessary in order to exempt the owners.

Cur. adv. vult. PER CURIAM.—I must take time to consider the question.

April 16.
JUDGMENT.

DR. LUSHINGTON.—This is a suit brought by the owners of the *Highlander* against the owners of the *Gipsy King*, for damage, in consequence of collision. The *Highlander*, laden with a cargo of pig-iron for Rotterdam, left Glasgow on the 25th April, 1846; and in the course of that afternoon, having proceeded some way down the river, she was anchored opposite to Dumbarton Castle, on the north side of the channel. In the evening, the customary light was put in the larboard fore rigging. About ten o'clock at night, the *Gipsy King*, being the last of three vessels in tow of a steamer, struck the *Highlander* on the larboard bow, and did the damage in question.

In February last, the cause was argued, when the Court was assisted by two of the Elder Brethren of the Trinity House; and, upon that occasion, I requested their consideration of two points; first, "Whether the *Gipsy King* had room to have avoided the collision, if she had been properly managed;" secondly, "Whether the *Highlander* had her anchor improperly laid in the deep channel." The substance of the answer to the first question was, that the *Gipsy King* had room to have avoided the collision; and, in proof of such answer, one of the Elder Brethren observed that the fact of three other vessels having previously passed proved that there was sufficient room. The answer to the second question was, that the *Highlander* had anchored in the deep water channel merely to stop the tide, which always allowed for a tide or two, without being moored. They were of opinion that she was properly anchored, taking a distinction between *anchoring* and *mooring*.

The result of those answers was, that, in the opinion of the Trinity Masters, the *Gipsy King* was to blame. In that opinion the Court concurred, and consequently, unless the

owners of the *Gipsy King* have a defence in law, but not on the merits, they must pay the damage.

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Gipsy King.

On a subsequent day, when the Trinity Masters were not present,—the cause having lasted till late in the afternoon of the day when it was first heard,—the Counsel for the *Gipsy King* contended that the owners were not liable, because the *Gipsy King* was, at the time of the collision, in charge of a duly-licensed pilot, and that there was a legal obligation to take such pilot, under a penalty. I have referred to the Statutes respecting the navigation of the river Clyde,—namely, the 6 Geo. 4, c. 117, and the 3 & 4 Vict. c. 118, and also to the Rules and Regulations said to have been made in pursuance of those Acts. It appears to me that the *Gipsy King* was bound, under a penalty, to have a licensed pilot on board, and that she had a duly-licensed pilot. I do not enter into the consideration of these Statutes and Regulations more particularly, because I apprehend that the import of them was not denied in the Argument, and it would be, therefore, unnecessary.

According to the opinion I have heretofore expressed, the owners of the *Gipsy King*, having on board a pilot, compulsorily taken, in charge of their vessel, would be exonerated from liability for any damage done by her to another vessel by collision, if such collision could, under the circumstances of the case, be attributable to the pilot only. This principle also was not contested at the Argument; but it was contended that the collision arose from acts improperly done, for which the pilot was not solely to blame; and if he was not solely to blame, the owners must pay, according to the principle sanctioned by the Judicial Committee, in the case of *The "Diana."**

This being the admitted principle, it remains to examine the facts, and endeavour to ascertain under which rule the circumstances bring this case; namely, under that rule whereby, when a pilot is on board in charge, the owners are exonerated; or that rule, that although there was a pilot on board, yet if the error was shared by any of the crew, then the responsibility is not taken off. The questions.

* 4 Moo. P. C. C. 11.

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Gipsy King.

The *Gipsy King* was a vessel trading regularly between Glasgow and Liverpool. On the present occasion she was prosecuting her voyage from Liverpool to Glasgow. Having reached Greenock, she came to anchor there, to await the tide. The master engaged the *Gulliver* steam-tug, to tow the *Gipsy King* to Glasgow; but she was to be left at Bowling Bay, ten miles from Glasgow, to discharge part of her cargo, and the steam-tug was to come for her subsequently. A licensed pilot was employed, and the charge of the vessel was given up to him. The schooner, together with two other vessels, was taken in tow by the steamer, and proceeded up the river, the schooner being the last of the three so taken in tow.

The Court has, on a former occasion*, expressed its opinion, that a ship in charge of a pilot, and also in tow, is to be considered, *prima facie* at least, still in the charge of that pilot, under ordinary circumstances; that, if the course pursued by the steam-tug is in conformity with the directions of the pilot, or not against his directions, and a collision takes place, the pilot is responsible, and not the owners, or the steam-tug, which ought to obey the pilot. If, however, the steamer disregarded the directions of the pilot, then the owners of the ship would be responsible, for the acts of their servant, and the owners of the steam tug might be responsible over to them in another form of action.

This, at first sight, seems all plain enough; but the case becomes rather more complicated when there are three vessels in tow, and a pilot, as in this case, on board the steam itself, and perhaps (I know nothing to the contrary) a pilot on board the two other vessels. I therefore wish express to guard myself against being understood to lay down a general rule which could be applicable to the peculiar case which might arise from such a state of things,—namely, steamer having several vessels in tow. I do not understand, however, that, in the present case, any such question has arisen. I believe I am correct in saying, that the condu

* *The "Duke of Sussex,"* 1 Notes of Ca. 161. 1 Rob. jun. 27
See also *The "Duke of Manchester,"* 4 Notes of Ca. 575.

of the steamer is not impugned, nor that of the pilot alone—I think neither is impugned alone; but it is contended that the damage arose from a cause for which the master and crew were either solely or partly responsible. The averment is this: “that the anchor of the *Gipsy King* was neither hoisted on deck nor catted, as proper and customary, but hanging over her bow under water.”

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To establish this averment, as an effectual defence to this action, and so throw the blame, in whole or in part, on the master, or his substitute, and the crew, three things are necessary: first, that the fact be proved; secondly, that it was the cause of the collision and damage; and, thirdly, that it was the fault of the master, his substitute, or the crew, at least in part. If there be a failure in any one of these particulars, the defence must fail also.

Facts to be proved.

I regret that I had no opportunity of putting to the Trinity Masters a specific question as to this point; but it was not raised until they were gone, and I must say that I do not think it of such difficulty as to require me to put the parties to the expense of a second attendance of the Trinity Masters,—more especially because, if they had thought that the master or crew had been guilty of any fault relating to catted the anchor, I do not doubt that they would have stated it to me in their opinion.

I have stated the main averment as regards the anchor; but it may be expedient to add, that it is also pleaded that the *Gipsy King* drove her anchor into the larboard bow of the *Highlander*, where it stuck fast, and that the hole made by the anchor admitted the water with such rapidity that, to prevent her from sinking, she was hauled on shore. In Answer to these averments, it is alleged that the rudder or keel of the *Gipsy King* caught the cable of the *Highlander*, bringing the bowsprit of the *Gipsy King* in contact with the *Highlander's* fore-rigging, causing the anchor of the *Gipsy King* to run into the *Highlander's* larboard bow. It is then pleaded that the anchor was properly catted, and was near to, but not in, the water, and was so agreeably to the Byelaws of the river. In Reply, it is denied that the collision

APRIL 16. took place by the rudder or keel of the *Gipsy King* catching the cable of the *Highlander*.

Gipsy King.

Now I think it necessary briefly to examine the evidence upon this point; and the evidence for the *Highlander* is this: No. 1 is the Protest of the *Highlander*, in which it is stated, "the anchor of the *Gipsy King* having been hanging over her bow, and not on deck, or catted, as is usual and customary." No. 2 is the affidavit of Roberts, a mariner; but he does not speak to the state of the anchor,—indeed, he was below; but he saw it sticking in the *Highlander*, and says, at the conclusion of his affidavit, that the principal damage was occasioned by the anchor. No. 3, the affidavit of James Butts, is of no importance as to this matter. No. 4 is the affidavit of William Sillis, the master of the *Highlander*, who deposes "that the *Gipsy King* struck the *Highlander* with great violence on the larboard bow; that the anchor was not properly catted; that one fluke was driven into the *Highlander* below the water-mark; and that the damage was principally occasioned by the anchor of the *Gipsy King* hanging over the bow and into the water." No. 5 is the affidavit of G. Howard, the mate, which contains these passages: "The anchor of the *Gipsy King* had penetrated the larboard bow of the *Highlander* at least three feet below the water-mark;" that "the anchor could not have been properly catted;" he denies that the accident could have happened by the rudder or keel catching the cable; he states that the *Gipsy King* was steered towards the *Highlander* "stem-on;" that the collision was occasioned by the steering and the anchor, and that, the next morning, the anchor of the *Gipsy King* was cut out of the *Highlander's* bow. There is another affidavit of the master (No. 6), and Kowne, speaking of the repairs which they say were done by inserting the African oak three feet below the water-mark of the *Highlander* when laden. No. 7 is the affidavit of Lloyd's surveyor (Mr. Garson), who deposes to the repair of the African oak three feet below water-mark.

The evidence on behalf of the *Gipsy King* consists of the affidavit of the master, who cannot speak to the facts, as he was not on board at the time; that of the mate and two

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others, denying that the anchor was not properly catted, and stating that it was hanging over the bow, but near to, and not under, the water, and they say that the immediate cause of the collision was the rudder or keel catching the cable of the *Highlander*. The affidavit of the pilot on board the *Gulliver* states that it was necessary that the anchor of the *Gipsy King* should be properly catted; that he believes he was so forming his judgment from "the mistake which it ran into the *Highlander*." Nothing can be more at variance with this conclusion than the affidavit of Daniel Patterson, who extracted the anchor, and who believes it was properly catted, "or it would have struck the *Highlander* eight feet further down." He gives a reason which the pilot of the *Gulliver* did not give, for he considers that the anchor must have been properly catted, from the part of the vessel which was struck; since, if improperly catted, the anchor would have struck her much lower down. The first question upon this evidence is, whether I can safely come to the affirmative conclusion, that the anchor of the *Gipsy King* was not properly catted? The *Trinity Masters* certainly gave no distinct opinion upon that point, and therefore I wish it to be understood that I cannot, and do not, import their authority into the question, further than by saying that, if it had appeared to them manifestly clear, and to have been of importance in the cause, it was natural to expect it would have been noticed. But, however this may be, relying upon my own judgment solely, I have, to say the least, great doubt if the proof does establish the fact. The collision must have preceded the penetration of the anchor,—that is clear from the evidence; but I will assume, for the sake of following out the argument, that the anchor was improperly catted, and proceed to the next question.

The next question is, was the improperly hanging the anchor the cause of the damage, in the truly legal sense of the term,—that is, on the supposition that it was improperly hung? If the *Gipsy King* was pursuing her proper course, and the anchor, from being improperly placed, and on that account alone, had struck the *Highlander*, and occasioned

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Gipsy King

the damage, then the collision would, *de facto* and *de jure* have been owing to the anchor. But that was clearly not the case here; for the primary cause of the collision was not the anchor, but the *Gipsy King*, either from improper steering or towing, being brought out of her proper course and into collision with the *Highlander*. Of this opinion were the Trinity Masters; and I entirely concur with them. If, then, this was the cause of the collision, of course, the collision was the primary cause of the damage, and I am of opinion that I cannot look further, with a view to ascertain how much of the damage was occasioned by the anchor, or by any other part of the vessel. This would be to institute an examination into secondary and inferior causes, — a novel principle in these proceedings, and one I am not inclined for many reasons, to adopt. It was argued that the anchor was the cause of the collision, instead of being the cause of the damage; but I hold that the collision was occasioned by the improper steering or towing of the vessel, and not by the anchor being improperly cattd.

The collision caused by improper steering or towing.

But were I to assume that the anchor was the principal cause of the damage, from being improperly cattd, as I come to the conclusion that the improper hanging of the anchor was, even in part, to be attributed to the crew?

The improper carrying of the anchor the fault of the pilot.

I entertain a contrary opinion. I conceive it is the proper business of the pilot to superintend the hanging of the anchor, and to take care that every thing is properly done to bring the ship to anchor in the port to which he is conducting her. The case of *The "Agricola,"** though not directly in point, in some degree illustrates the principle. There, the Trinity Masters expressed their opinion that it was the exclusive duty of the pilot to decide upon the proper time and manner in which the anchor should be dropped. If he is to decide the proper time and manner of dropping the anchor, it appears to me almost a matter of course for the pilot to see that the anchor is in a proper situation, in order that it may be dropped at a proper time and in a proper manner. So I think it is a part of his duty to see that the anchor is properly cattd for dropping; and it is more espe-

* 2 Rob. jun. 14. 2 Notes of Ca. 113.

cially so in the present case, because the Rules and Regulations of the river, for the navigation of which he is a pilot, particularly direct what is to be done as regards having the anchor ready to drop, and surely he must be considered as cognizant of, and bound to execute, the Rules prescribed by the authority under which he was acting. But I do not decide the question upon this ground; because in my judgment the cause of the collision was not the improper carrying of the anchor, and not the want of readiness to drop it.

For the reasons I have stated, I am of opinion that this collision was occasioned by the fault or default of the pilot alone; that the *Gipsy King* was bound to employ such licensed pilot; and therefore, the damage being occasioned by the acts of a person not selected by themselves, but compulsorily employed, the owners are exempt from all liability as to the damage.

I give no costs on either side; and I do not believe that, in any of the cases circumstanced like this, I have done so. I did not in *The "Agricola,"* or *The "Fama."* In the case of a vessel claiming exemption from liability for damage done to another in consequence of the default of the pilot on board, who was solely in fault, which cannot be known to the other vessel, I think there are strong reasons against giving costs. Therefore, I hold the owners of the *Gipsy King* relieved from responsibility as to the damage, and make no order as to costs.

Proctors:—*W. Townsend*, for the *Highlander*; *Toller*, for the *Gipsy King*.

Prerogative Court of Canterbury.

APRIL 20.

1st Sess.

IN THE GOODS OF THE REV. CHARLES FREDERICK BALDWIN, DEQ.—Motion, ex-parte.—The deceased died 19th November, 1846. He left a will, dated 15th June, 1838, will of 1838,

* 2 Notes of Ca. 418.

APRIL 20. 1838, duly executed and attested, except that, on the last (5th) sheet, below the signatures and attestation (which were half-way down), certain memoranda were written (consisting of a request that his executors would destroy his sermons in MS., and other matters not of a dispositive nature), which were signed, but not attested. Upon the back of this sheet of the will was a codicil, dated 17th June, 1844, duly executed and attested. No positive evidence could be obtained as to whether the memoranda at the foot of the will were written before or after the execution of the codicil.

Baldwin, dec. *Deane, Dr.*, moved for probate of the will and codicil alone (without the memoranda) to the executors.

DECREE. SIR H. JENNER FUST.—The memoranda at the end of the fifth sheet of the will are stated in the Case not to be testamentary; but I think it is impossible not to consider them as testamentary, and, as forming part of the will, they had been attested, of which probate must have been taken. The question, however, does not turn upon this point. But a codicil is written upon the back of the last sheet of the will, and that codicil, which is duly attested, is declared to be a codicil to the testator's "last will and testament," that is, the will on the other side. What was his last will and testament? The will, exclusive of the memoranda, which never formed part of the will, as they were not duly executed, unless they had been duly published by the codicil. I am of opinion that these memoranda—which are mere directions to his executors—were not published upon the execution of the codicil, and that I must decree probate of the will and codicil without the paragraphs at the end of the fifth sheet.

Wheeler, Proctor.

Where an infant, under two years, died, intestate, entitled to the goods of William Augustin Jaques, decd.—*Motion, ex-parte.*—The deceased died 24th May, 1832, an infant, aged one year and upwards, intestate, without

father (surviving), leaving Sarah Grace Hitchcock (wife of Richard Hitchcock); his mother and only next of kin, two sisters and a brother, the only persons entitled in distribution to his personal estate. The only property to which he was entitled consisted of one fourth part or share of the residuary estate of Thomas Jaques, his father, bequeathed to him by his will, distributable between the deceased and his sisters and brother, upon the death of their mother, who he, under the said will, entitled to the interest and dividends of the residue for life. After the death of Thomas Jaques, his widow married Richard Hitchcock, and, subsequently to such marriage, in April, 1844, a suit was instituted in the Court of Chancery, touching the estate of Thomas Jaques, by Mrs. Hitchcock, the mother of the deceased (by her next friend), and by the two then surviving children (by their next friend, they being minors), against various parties, including the husband of Mrs. Hitchcock, the proceedings in which were stayed for want of a representative of William Augustin Jaques, the deceased. Mrs. Hitchcock was willing to take the administration, but was unable to procure the execution of the bond by her husband, who left her in May, 1845, and had ever since lived separate and apart from her, and she was unable to ascertain where he resided, and she verily believed he would not execute such bond. The deceased's share would not amount to more than \$186 Three per Cents, not payable until after his mother's death, and she was willing, if administration could not be granted to her without the assent of her husband, to renounce her right thereto, in order that it might be granted to one of the sisters of the deceased, now of full age.

Addams, Dr., moved for administration to be granted to **MOTION.**
Mrs. Hitchcock without the execution of the usual bond by her husband, on such bond being executed by an additional surety; or to the sister, upon the renunciation of her mother.

SIR H. JENNER FUST:—There must be a Decree against the husband. The wife cannot abandon his right without his consent, or without giving him the means of

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Jaques, dec.

to a share of the residue of the estate of his father (who had predeceased him), the interest of such residue being bequeathed to the widow (the deceased's mother) for her life, the Court refused to grant administration of the infant's effects to his mother, who had re-married (a representation being required to carry on proceedings in Chancery), her husband, who had separated from her, being unwilling to execute the usual bond.

APRIL 20. knowing, so as to enable the Court to decree administration in his absence. It is an unfortunate case; but still the practice of the Court must be observed. I must reject this motion.

Jaques, dec.

A Decree was extracted, calling upon Mr. Hitchcock to accept or refuse administration, or shew cause why the same should not be granted to Mary Elizabeth Jaques, spinster; which was served upon Mrs. Hitchcock, and upon the solicitors of her husband, they accepting the service for him. No appearance being given, on the second session of Easter Term,

April 30.

Addams moved for administration to Miss Jaques, which, PER CURIAM, was granted.

Pulley, Proctor.

A will, written in 1834, by a widow, a person originally of 8th November, 1844, aged 70, a widow (having been twice married), leaving no issue, and being possessed of personal property, amounting, at the time of her death, to about £90,000, besides a freehold estate valued at £3,200. Her property was derived from her first husband (Mr. M'Ghie), who died in 1818, and left her £40,000, which she had augmented by accumulations. She left two brothers and five sisters, her only next of kin, the elder brother, Mr. Thomas Waring, being heir-at-law. The will in question, dated in 1834, which was written by the deceased, and contained a clause of attestation, but the name of no witness, gave a large benefit to Major Henry Waring (no relation of the family), who, as one of the executors, propounded it, along with a codicil, also in the deceased's handwriting, without date; and both papers were opposed by Mr. Thomas Waring and other next of kin, on the ground that the deceased (who had been found, by a Commission of Lunacy, in October, 1841, to have been insane from 6th September, 1838) was of unsound mind at the time of making and executing the papers.

WARING v. WARING AND OTHERS.—Cause.—This was a suit respecting the will of Mrs. Sarah Gibson, who died 8th November, 1844, aged 70, a widow (having been twice married), leaving no issue, and being possessed of personal property, amounting, at the time of her death, to about £90,000, besides a freehold estate valued at £3,200. Her property was derived from her first husband (Mr. M'Ghie), who died in 1818, and left her £40,000, which she had augmented by accumulations. She left two brothers and five sisters, her only next of kin, the elder brother, Mr. Thomas Waring, being heir-at-law. The will in question, dated in 1834, which was written by the deceased, and contained a clause of attestation, but the name of no witness, gave a large benefit to Major Henry Waring (no relation of the family), who, as one of the executors, propounded it, along with a codicil, also in the deceased's handwriting, without date; and both papers were opposed by Mr. Thomas Waring and other next of kin, on the ground that the deceased (who had been found, by a Commission of Lunacy, in October, 1841, to have been insane from 6th September, 1838) was of unsound mind at the time of making and executing the papers.

The Allegation, propounding the papers, pleaded the preceding facts, and also that the codicil, which was limited to a provision for a goddaughter, born in 1836, was made shortly after her birth; that, when the Commission *de lunatico inquirendo* was executed, the papers were found locked up in the repositories of the deceased, and taken into the custody of Mr. Thomas Waring (at whose suit the Commission was executed, and who was appointed one of the Committee of the estate), under whose control they remained, and that the first information Major Waring received of the existence of the will and codicil (he being resident at Newry, in Ireland) was in February, 1846.

An Allegation on the part of the opposers of the papers pleaded as follows :—

That, in May, 1821, the deceased (then Mrs. McGhie, widow, formerly Sarah Waring, spinster) married, at Edinburgh, Mr. Archibald Gibson, merchant of that city; that they came to England, and settled at Weybridge, Surrey, where Mr. Gibson died, 6th March, 1823; that a few months after her second marriage, the deceased became very strange and eccentric in her conduct, very irritable in her temper, and extremely suspicious of those about her, especially her servants; talked in a wild and incoherent manner; laboured under a constant apprehension that she was the object of persecution, and that some scheme was afloat to endanger her personal safety; that, in October, 1821, she entertained, though without any rational foundation, a suspicion that her husband was endeavouring fraudulently to obtain her property and to poison her; that, in 1825, she had an impression (contrary to the fact) that certain ladies were in the habit of making faces at her in church, and she went before Admiral Stirling, a magistrate, and complained of the conduct of those ladies; that, in December, 1825, and January, 1826, she laboured under the delusion that she was considered by her friends and neighbours as a person of meretricious habits, and declared that her conduct had been animadverted upon from the pulpit, under which erroneous impression she wrote letters to Sir Richard Frederick, a magistrate, requesting his influence to rescue her from such opprobrium; that, in 1833, she imagined that various persons were in love with and making overtures of marriage to her, one being a married man and another her medical attendant, to whom she wrote under such delusion; that, in 1830, she hired, as a servant, a girl, named Jane, from the Found-

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ling Hospital, who used to sleep in her room at night, and in the day was locked up in a room at the top of the house by the deceased, who carried up her meals; that the deceased having on several occasions severely beaten the girl, the Governors of the Hospital removed her; that for several years before and after the date of the will she imagined that her relations and friends, including her brother, Thomas Waring, appeared before her in disguise, or in the likeness of other persons; that, in 1836, she imagined that her house was surrounded by persons in disguise, and under such delusion, caused the windows, doors, and gates to be fastened, in which state she remained for more than a year as a close prisoner; that, from 1825, she was in the habit of sending letters, availing that she was labouring under delusions, to James King, a quack; that, during her residence at Weybridge, she was in the habit of conversing familiarly with her female servants in the most disgusting and indecent manner, and during the same period she frequently declared to them that one "Will Deane" was constantly persecuting and annoying her, stealing her wine and breaking her windows, and in consequence of such persecution, she had a close wooden paling erected in front of her house; that, in 1838, and subsequently thereto, she often asserted that a man who came to Weybridge with a basket on his head, carrying fish, was Lord Melbourne in disguise, and when beggars called at the house, she declared that they were persons in disguise; that she was in the habit of remaining up and walking about the house during the greater part of the night, opening and shutting doors and windows, and talking to herself, and that she would frequently fire off pistols at night; that, in August, 1841, Mrs. Nash, one of her sisters, went to visit the deceased, and found her alone, without any servant or other person in the house, and her conduct and conversation were so violent and incoherent, that a petition was presented to the Lord Chancellor, who issued a Commission, under which the deceased was found insane; that neither at the date of the will, nor for some years before, nor afterwards, was the deceased of sound mind, or capable of executing a will, and that Major Henry Waring was in no way related to or connected with the deceased, who never corresponded with him, nor was he ever personally known to or seen by her.

An Allegation, on behalf of Major Henry Waring, the party propounding the papers, pleaded:—

That, upon her second marriage, the whole property of the deceased was settled upon herself for life, independently of her

In which, with regard to his dog life, if the survivor, and to other children, and in default of children, to her or her husband, whichever should be the survivor, absolutely; that, after the marriage, Mrs. Gibbes appeared to be in embarrassed circumstances, and he obtained from the deceased advances to the amount of £1,500 or £1,600; but that she did not at any time entertain a suspicion that he was endeavouring fraudulently to obtain her property (if at all) without any rational foundation, or express a suspicion that he was endeavouring to poison her; that she was at all times and naturally, violent, irritable, and suspicious; and that her husband, Mr. Gibbes, was himself of a peevish temper and dissipated habits, often drinking to excess, and they lived unhappily together; that after his death, in 1833, the deceased, having suffered some delay in regaining possession of her property, died in Chancery against the trustees, who never disputed her right to the transfer, which was accordingly made in 1834, and she had the sole control of her property until 1841; that she was naturally of peevish habits and eccentric in her general conduct and behaviour, and not aware of such her natural eccentricity which increased upon her as she advanced in years; that any apprehensions she may have entertained of being persecuted from spiteful, malicious, or interested motives, are no proofs of insane delusions; that her discourse was not wild and incoherent, nor her conduct at variance with perfect rationality at least, until shortly prior to 1838; that a person named William Deane, or Deane, was in 1838 taken as an assistant by Mr. Harcourt, a surgeon at Weybridge, the deceased's next-door neighbour, and whether he did or did not play practical or other jokes upon the deceased, her complaints of Will Deane's could have had no existence prior to 1838, and he was not an imaginary person; that the deceased conducted her own affairs, pecuniary and domestic, with singular prudence and propriety, and was skilful and discerning in the management of her property, whereby she more than doubled its amount, having made an investment of £1,000 on the 29th August, 1834; that she had numerous correspondents, and wrote and was written to as a person of sound mind; that amongst such correspondents was her brother Thomas (party in this cause), to whom she wrote repeatedly in 1833 and 1834, and who advised her to make a will so late as November, 1837; that the deceased, who was fond of genealogy and heraldry, in 1828, introduced herself by letter to Mr. Thomas Waring (now deceased), father of Major Henry Waring, as head of the Irish branch of a family of the same name as her own,

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which had been settled in Ireland in the time of Cromwell;—the immediate occasion of her so writing being her having seen his name in the newspapers as presiding at a meeting of the Brunswick Club at Newry, at which strong resolutions were passed in favour of what she was devoted to, the cause of Protestant Ascendancy; that Mr. Waring having replied to her letter a correspondence ensued between her and his family, principally with Miss Jane Waring, his sister, and which continued until Miss Waring's death in 1839; that the deceased expressed herself greatly interested for Mr. Waring's son Henry (party in the cause), then a major in the 60th Foot, made frequent inquiries about him and his family, and desired to have locks of the hair of his twin daughters, born in 1829; that the deceased frequently invited Miss Jane Waring and her nephew Henry to visit her at Weybridge, and upon their coming to London for a few days, in October, 1831, the deceased immediately called upon them and took them with her to Weybridge, where they stayed two days being entertained by her with the utmost kindness and cordiality and dismissed with every assurance of her taking a great interest in the welfare of (especially) Major Henry Waring; that the deceased was on intimate terms with Mr. William Elers: (with whose mother she had been intimate in her girlhood), whose son, a legatee in the will, was her godson, and that he and his wife passed some days with the deceased in 1833 and 1836, and that she was likewise on intimate terms with the Rev. Carew Thomas Elen whose daughter, Adeline, is a legatee in the codicil; and it pleaded that it was not in the first instance alleged that the will propounded was invalid by reason that the deceased was of unsound mind, but only (or very principally) owing to its unfinished state, having clause of attestation without any subscription of witnesses.

A further Allegation, on the part of the opposers of the papers, counterpleaded that part of the adverse Allegation which stated that a person named William Deans was, in 1838, employed by Mr. Harcourt, and alleged that the person so referred to was named Samuel Deane, not William or Will Deans, and that the person whom the deceased imagined to be constantly persecuting her, was known to her, prior to her marriage with her first husband, whilst she lived with her father at St. Mary Cray, Kent, by the name of "William Deans," a beggar, who had never been at Weybridge since the deceased had resided there.

The cause was argued in Hilary Term, 1841, by Messrs. Adams and Robertson, Drs., for Major Henry Waring, supported the sanity of the deceased at the date of the will. The Jury, in spite of the attempts of the family, carried back her insanity no farther than 1838, and the medical witnesses do not agree in their accounts of its character. The deceased was eccentric and crotchety, and there are strange expressions in some of her letters; but there is nothing in the will which stands so folly, the property bequeathed by her having been acquired not from her own family, but her husband.

Sir J. Dodson, Q.A., and Jenner, Dr., for Mr. Thomas Waring and the next of kin, argued that the disposition contained in the will, which gave £37,000 to Major Waring, a stranger, with whom the deceased had had no intercourse, and had only once seen, to the prejudice of her own family, was not in accordance with natural feelings, and was itself an indication of insanity; that the will in question was not discovered until after the verdict of the Jury was found, and that verdict did not bind or bar the Court; that the documentary evidence afforded clear proof that the deceased laboured under hallucinations of mind in respect to Will Deans, and persons haunting her in disguise and in the likeness of other individuals, and the proof was rendered complete by the oral testimony, which shewed that her brother, Mr. Thomas Waring, who was appointed her sole heir and executor by a will of 1821, was excluded, owing to a delusion under which she laboured that he had turned Roman Catholic.

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SIR H. JENNER FURT.—The will in question is opposed on the ground that the deceased, at the time of her making it, was of unsound mind, and had been so for several years before, and so continued until her death; and it appears in the proceedings, and is not denied, that, in 1841, an Inquest was held as to the state of her mind, and witnesses were examined, and certain letters were produced before the Jury, who were of opinion that she was at that time insane, and had been so from September, 1838; not, there-

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fore, including the period of time when the will was written, nor, perhaps, the codicil, though no account is given of the exact date of the codicil; and therefore, the deceased having been found, in October, 1841, insane from 1838, the question for the Court to decide is, whether she was of unsound mind at and before the time when the will of 1834 and the codicil of 1836 (or whatever be its date) were made, or whether her insanity supervened at a later period of time: and that is the whole question.

The will.

Upon the face of the will itself, there is nothing to induce the Court to consider this lady insane: if she was insane at the time, the evidence of her insanity must arise from circumstances not apparent on the face of the will, which is in her own handwriting, and very fairly written, the language being liable to no exception whatever. The purport of the will is to give an annuity of £100 to each of four of her sisters, for life: here, therefore, is a provision for all her sisters except one, for whom she makes a provision afterwards. It then gives "to Mr. Henry Waring, of Newry, in the county of Down, Ireland, late a Major in the 59th regiment of Foot, and to his children, all the stock vested in her name in the Three per Cent. Reduced Bank Annuities." So that here is a large provision (about £13,000) for Mr. Henry Waring, who, on the face of the will, would appear to be a connection of the family. She also gives to Mr. Henry Waring, "all the plate in my possession of every description, requesting him to preserve it in his family in remembrance of me; also the house and furniture," that is, her freehold house at Weybridge, in Surrey; "also the china, books, and pictures." She gives to her godson, Frederick Wadham Elers, son of Mr. William Elers, £500: there is nothing absurd or improbable in this bequest to her godson. To Mrs. Jane Waring, the aunt of Mr. Henry Waring (party in the cause), she gives £100. She gives £200 to the Rector of the parish of Grayford, Kent, upon trust for the benefit of poor widows. Then follow legacies of £50 to Miss Julia Agnes Willison, and £500 to Miss Susannah Lee. She gives the residuum of her personal property to her brother, Mr. Thomas Waring, her

ister, [Mrs. Nash] and Major Henry Waring; and their heirs, to be equally divided in three shares; that of her sister to be invested in Government securities, in the names of her executors, upon trust to pay the interest to her for life, and after her decease the principal to be divided amongst her children. She appoints her brother, Mr. Thomas Waring, and Major Henry Waring, executors, and she revokes all former wills. The paper concludes: "In witness whereof, I, the said Sarah Gibson, have to this my last will and testament, contained in five sheets of paper, to each sheet thereof set my hand, and to this last affixed my seal, this 1st day of March, 1834." Then follows the signature, but there is no seal; and there is a very full attestation-clause: "signed, sealed, published, and declared by the said testatrix, Sarah Gibson, as and for her last will and testament, in the presence of us, who, in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses"—but no witnesses' names are attached to it.

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There is then what was intended to be a codicil, or part The codicil.
of a codicil, to the will: "Whereas I, Sarah Gibson, of Weybridge, in the county of Surrey, widow, have made and duly executed my last will and testament in writing, bearing date the 1st day of March, 1834; I do hereby declare this writing to be a codicil to my said will, and I direct the same to be annexed thereto, and to be taken as a part thereof. I give and bequeath to my goddaughter, Adeline Elers, daughter of the Rev. Carew Thomas Elers, vicar of Bickenhill, near Coventry, Warwickshire, the sum of Five hundred pounds"—and there it breaks off, there being neither seal, signature, nor attestation; but there is written in pencil, "2 witness's," as if she had intended to have it executed in the presence of witnesses. Whether she intended to add more to it, the Court has no means of knowing; but it appears that the goddaughter was born in March, 1836; and consequently the paper must have been written between that date and the year 1842, when the legatee died.

These are the contents of the papers propounded, and, as

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I said, there is nothing on the face of the will which shews any degree of absurdity or any improbability whatever, in respect to the disposition or to the persons benefited. With regard to Mr. Henry Waring, he does not appear to be any relation of the deceased's family; he is the son of a gentleman in Ireland with whom the deceased had no acquaintance, and no communication until 1828, when a correspondence took place between her and his father, in consequence of her seeing the name of the father in the newspapers as presiding at a meeting of the Brunswick Club, at Newry, at which resolutions were passed to secure the Protestant Ascendancy, of which this lady was a staunch and devoted supporter; and letters passed between them, and afterwards the correspondence was carried on between the deceased and Jane Waring, the aunt of Major Waring, which continued up to a late period, until the death of Jane Waring, in 1839; and with respect to Major Waring, the deceased had no correspondence with him, and no personal knowledge of him until October, 1831, when he and his aunt, Jane Waring, being in London, the deceased came to town and took them down to Weybridge, where they remained during the following day, returning the next morning, and there was no personal intercourse afterwards between them. The bequest to Major Waring is no doubt very considerable in amount,—her stock in the Three per Cents Reduced, amounting to about £13,000, the house and furniture, the plate and a third part of the residue.

Preliminary
objections.

The circumstances under which this question comes before the Court are these:—Upon the deceased being found lunatic, in 1841, Messrs. Thomas and Richard Waring, her brothers, were appointed Committee of her estate, and two of her sisters Committee of her person, under the direction of the Court of Chancery. I may here notice the observation of Counsel, that Mr. Thomas Waring had kept back the knowledge of these papers from his co-executor, Major Waring, who ought to have been apprized of their existence earlier. But I think there is no force in this observation; nor any imputation upon Mr. Thomas Waring because he did not communicate the existence of this will to Major Waring in the

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lifetime of the deceased. Mr. Thomas Waring, being Com-
mittee of the estate, took charge of all documents belonging
to the deceased, and there was no necessity for his commu-
nicating to any individual what she had done with respect
to the disposition of her property. So I think it is no
imputation upon Mr. Thomas Waring that he made no
communication to his co-executor during the lifetime of
the deceased. She died, in November, 1844, and in Fe-
bruary, 1845, a communication is made to Major Waring,
in Ireland, of her death, and of the bequest in her will to
him, at the same time, stating the legal advice which had
been received, that the will was invalid owing to its having
a clause of attestation and no witnesses.

Another observation has been made, in the course of the
proceedings, namely, that the opposition to the will on the
ground of the deceased's unsoundness of mind is an after-
thought; that, in the first instance, the will was opposed
solely on the ground of its having a clause of attestation and
no witnesses. I do not think this is quite accurately stated;
for Messrs. Simpson and Dimond, the solicitors of Mr.
Thomas Waring, had written to Major Waring, on the 5th
February, 1845, stating that there was reason to suppose,
and that evidence might be obtained to shew, that the de-
ceased was of unsound mind prior to 1834; but, under the
circumstances, it was extremely natural, and to be expected,
that if the will was, as Mr. Thomas Waring had been
advised (whether rightly or wrongly), not valid, because it
was not executed as the deceased intended to execute it, in
the presence of witnesses,—I say nothing could be more
natural than that, in order to avoid expense and litigation,
the opposition should be put upon that ground of invali-
dity. It was impossible for Major Waring to have obtained
probate of the paper without coming before this Court and
propounding it, for there being an attestation-clause and no
witnesses, and the paper purporting to dispose of real pro-
perty, probate in common form would not have passed. I
think there is no imputation upon either party, the party
propounding the paper, or the party opposing it, in this
respect.

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In the first instance, Mr. Thomas Waring opposed the will as executor of a will of the deceased, dated in June 1821, in which she had appointed him her "sole heir and executor," and in case of his death, his brother Richard and Major Waring was advised to take out a Decree calling upon the other parts of the family to see the will of 1821 propounded, and it is urged as a complaint against the brothers and sisters of the deceased, that they appeared by the same Proctor as Mr. Thomas Waring, who contested the suit as executor of the will of 1821. I confess it does not strike me that there is any impropriety or incongruity in their appearing by the same Proctor. What advantage was to be gained by their so doing? There could be no danger or prejudice to the party propounding the paper. The only thing said is, that the next of kin, having no interest under the will of 1821, have appeared with their brother, who has an interest under that will, to assist him in opposing the will of 1821. The Court has nothing to determine as to the will of 1821, for Mr. Thomas Waring, as well as the others, has a right to oppose the will of 1821.

Stripping the case of these matters, which have nothing to do with it, the Court may now consider the real state of the case with reference to the pleas and proofs before it.

History of the
deceased.

The deceased was the daughter of a very respectable gentleman, a medical practitioner, at St. Mary Cray, Kent. She seems to have been a person at all times of a suspicious disposition, a violent and irritable temper, eccentric and singular in her conduct, dress, and habits; the pleas and answers on both sides admit this to be the case. Before the death of her first husband, she resided in Scotland, and in 1822 or 1823, after her second marriage, she returned to Weybridge. The marriage between her and Mr. Gibson does not appear to have been productive of much happiness; but in March, 1828, he died, and the deceased continued to reside at Weybridge until she was removed, in 1841. Shortly after the death of Mr. Gibson, her money was transferred from the names of the trustees into her own name, and the dividends of the funds continued to be received by the house of Prescott, Grote, and Co., her bankers, until

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During that period, she had considerable sums of money in her hands, at different times, and the accumulations of her funded property were, at various periods, invested in other funds, by her direction. And so with respect to the rest of her property and the disbursements of the house, the hiring of the servants, and the whole of her domestic arrangements, they were conducted by her, and with great propriety and correctness. She lived a very secluded life, and was very penurious, and she was thus able to make those large accumulations of property. There is, however, nothing in the character of this lady, or in her mode of living, from which the Court would be entitled to conclude that she was in a state of insanity;—the question to be determined by the Court,—and it is only by reference to the evidence, oral and written, that the Court could be able to draw such a conclusion. The deceased, it is admitted, during the last six years of her life, was in a state of insanity; whether she was so at the date of this will, or before that time, is the question which the Court has to determine, because supervening insanity will not affect the validity of a will executed during the time she was of sound mind.

The difficulty, in all these cases, where so long a time has elapsed, is to find evidence which goes directly and positively to particular periods of time. The next of kin assign a very early date to the commencement of the insanity of the deceased, for they plead that it began shortly after her second marriage, in 1821, and some letters are produced written by the deceased in 1821, 1822, and 1823 (for there is no oral testimony before 1824 or 1825), upon which the whole proof depends as to her apprehension of being poisoned by her husband, and the means he tried to get possession of her money. But I think the Court may throw out of its consideration all that happened in the lifetime of her husband, Mr. Gibson, as affecting the state of her mind at that time, for as to the expressions in the letters, "I am under an apprehension of being poisoned," and "he is bent upon my death," they are very loose, and I cannot say that I find any thing in these letters to shew any real appre-

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hension of being poisoned by her husband; they only go to shew that he had no real regard for her; there is nothing to denote a settled unsoundness of mind at that time. It is admitted that it was the character of the deceased, from an early period of time, to be jealous and suspicious, and in the last of these letters, written in April, 1823, just after the death of her husband, she speaks of some plot against her but all is much too loose and indefinite for the Court to place any reliance upon it. I may, therefore, safely say by every thing which occurred before 1825, when she applied to Admiral Stirling, a magistrate of the county of Somerset.

It is important to shew the character of the unsoundness of mind which is said to have exhibited itself at this early period, and to trace it afterwards, as far as we can, to see whether she continued in the same state from 1825 to 1831 when it is admitted that she was insane.

Eccentricity must be coupled with delusion to shew insanity.

It was a matter of discussion, some years ago, whether eccentricity amounted to insanity, and it came to this that eccentricity, by itself, would not amount to insanity but that eccentricity coupled with delusion may constitute unsoundness of mind, and render a party incompetent to do certain acts. The question, therefore, in this case is not simply whether the deceased was eccentric, or singular, or peculiar in her character, manners, and disposition, but whether she was subject to insane delusions,—delusions as to things which did not exist.

Evidence.

The first witness is Sir Richard Frederick, and he is a person upon whom the Court may safely rely, as giving a true and fair account of the state and condition of this lady. He says he first saw the deceased, at a dinner-party, in the lifetime of her husband, Mr. Gibson, when there was nothing particularly observable in her. In consequence of a letter he received from her, after her husband's death, he called upon her, when she told him that Sir Edmund Nagle had been there with her; that he was deranged; that he had got her up into a corner of the room, but she had escaped from him; that he then jumped out of the window into the garden; that she had followed him and pacified him, and

that she had written to Lord Liverpool about him, and she sent the letter to Sir Richard, who says it was exceedingly well expressed: and many of her letters are written with great correctness of expression, and are extremely sensible letters, where she does not refer to particular delusions. On receiving a third letter from her, Sir Richard says he wrote to some of her family, and he says "the deceased was decidedly deranged when I saw her in 1825; I have no doubt about that." He says he waited upon the deceased in consequence of a letter he received from her; it is necessary, therefore, to see the letters she wrote to him. The first is dated 11th December, 1825, and is to this effect:—

It was not till I received Watson's information, that he had executed my commission, that I knew who was the presiding magistrate with Admiral Sterling for this parish—he pleased to accept my thanks for the honour of your attention—for reasons unnecessary to explain, I have abstained from communicating with Admiral Sterling.

I am so anxious that this business should be immediately and decidedly dropped, that I send this letter to London, to be put into the Post there, that no one in this place may be aware of my writing it. I am sorry to say that, during my whole residence in this place, all my endeavours at conciliation, which have been repeated and various, have failed; when my private conduct and transactions are made the theme of animadversion, from year to year, in the pulpit, I am under the necessity of quitting the Church. I am always thankful for *private admonition*, but I am not conscious that I require either public or private. I have no earthly views; I am bending my steps to another world, and could wish to tread the mournful path in peace and charity with all mankind. As this is impossible, I have decidedly withdrawn myself from those who have refused all sociability, with a determination to retire within myself.

My aged father is upon the brink of the grave, unable to get into his carriage, and I am careful to shield his mind, as much as possible, from all painful subjects....

It appears that she had an impression that animadversions had been made upon her conduct from the pulpit, and that she did withdraw from the church. Of this letter Sir Richard Frederick took no notice, but on the 22nd Decem-

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ber, 1825, he received another letter, to the following effect:—

May I request the favour of a personal interview at your convenience? It is not upon my own account that I solicit this honour; it is respecting *one* whose consequence is far above my level, and whose well-being I am extremely anxious to protect.

Believe me, Sir, when I assert, that I am a person long inured to misery, not only my own, but an intimate acquaintance with that of others. I am but too conscious that I have been misconceived to be a person of meretricious habits—no such idea ever did stain my mind, and for what motive, which must ultimately defeat its intentions, I have thus been erroneously suspected, I am at a loss to conjecture. Be assured, Sir, you will find me not merely a matronly, but an humble, old-fashioned woman, who is ready at all times to lend her assistance to those in need whose inclination leads them to seek it.

It is in your magisterial capacity that I ask this favour, and I promise myself that you will feel every self-gratification in an amiable and honourable participation in my views.

The reference to “meretricious habits” is not an immaterial expression, as it applies to another part of the case, namely, her opinion of her personal attractions. Upon receiving this letter, Sir Richard Frederick called upon her, and had the conversation with her which he has detailed in the evidence I read. On the 11th January, 1826, he received the following letter from her:—

It was not my intention to trouble you again, but the sequel of my information to you should be explained.

On Monday, I discharged my man-servant, a respectable, useful person till the last four months; during this period, he has, though I was hardly conscious of it, irritated my nerves: since I had the honour of seeing you, he has endeavoured to crush *them* by the most violent explosion of his bodily power. So soon as I recovered my self-possession, which was on the 6th inst., I gave him warning to quit at a month, not wishing to destroy a man, who has a wife, and who had hitherto been respectable; but I found my life was in danger, and I dared not to encounter his person; therefore I insisted upon his quitting the house on Monday morning, and I sent to Watson, the constable, to inform him that I had nothing more to do with him, and desired him to keep his eye upon him, as he said he should not quit the place till

Wednesday.. *I am afraid Watson does not wear your livery.* The man has been in concert with others, and the gleanings of my kitchen have been the foundation of discourses which should have been composed of the most refined sentiments.

My faithful dog pointed out my danger by every action that instinct could direct; but I sent it away, that the naked truth should be developed. My father is still in so precarious a situation, I tremble at the idea of saying any thing to the family upon so unpleasant a subject. Before the Bishop of Oxford vacated the Living at Lewisham, he kindly took the whole family constantly into his seat at church for ten years. I wrote to one of the curates, requesting he would tell me the real state of my father, and have received a most friendly letter from him. I am indeed much hurt at what I have experienced, but a conscience void of offence, and a reliance upon Divine Providence, supports my fortitude. I cannot call any one to my assistance, because those who have power are involved in troubles too sacred to be invaded. Should it be your own wish for any further explanation, I am most willing to enter into it in presence of any friend you may choose; but I submit this, with all possible deference, to your superior judgment.

I am extremely sorry to say that, from personal motives, I cannot communicate with Admiral Sterling, and had rather he should not be consulted, if it can be avoided.

If gratitude can be acceptable to you from one so humble as myself, be pleased to conclude that my heart overflows, and well it may, to be rescued from a disgusting opprobrium which has wounded my senses and feelings for *three years*.

What is the meaning of "the most violent explosion of his bodily power" I do not know. But it is impossible to say that this letter was written by a person who was in a sound state of mind at the time. She talks of finding "her life to be in danger:" that is a part of the character of this lady, thinking there were plots against her. What was the danger? What did she apprehend? a "violent explosion of bodily power," or what? What were the "personal motives," as to Admiral Stirling, does not exactly appear; but I think it most probable that it refers to a notion of the deceived, that some ladies had made faces at her in church, and she consulted with Admiral Stirling upon the subject.

These letters, and the conversation which Sir Richard Frederick had with this lady, impressed him with the firm belief

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that she was "decidedly deranged," the expression he has used, and I think it is quite impossible to read the evidence of Sir Richard Frederick, and the letters connected with it, and to doubt that his was a right conclusion, that at that time she was in a state of absolute derangement; it is, indeed, only contended by Counsel that it was temporary.

This brings us to the year 1826. I pass by the general evidence as to mere eccentricity of conduct, because it is better to go to direct and particular facts. During the year 1826 (in the month of June) she was attended by Mr. Stilwell, a surgeon, at Walton-on-Thames. He says he attended her occasionally from that time until September, 1831, and from the first she was very strange and eccentric in her conduct. He judges that her temper was very irritable from the manner in which he observed her work herself up on trifling occasions, and sometimes from imaginary causes; "her lips quivering and her eyes working so as undoubtedly to indicate more than an ordinary irritability of temper." He says that she was very suspicious of those around her, always changing her servants, and from causes that seemed to him to be groundless; that the general topic of her conversation was that some plot was being laid against her by her servants or some persons in disguise about her. "Upon these subjects," he says, "she talked wildly or irrationally, for her fears were imaginary, mere delusions. She would talk rationally on other subjects, but soon returned to those imaginations that disturbed her." He says he does not think she was ever, after June, 1826, free from the delusion that some plot, some scheme endangering her personal safety, was in preparation against her: "I consider it to have been a decided evidence of disordered mind." Upon the next article he speaks of her complaint to him that some ladies, who, he says, were "highly respectable, amiable, and benevolent ladies," annoyed her by making faces at her in church,—which was purely imaginary on her part,—telling him that she had been to Admiral Stirling, the magistrate, about it. Here, therefore, was a pure delusion in her mind, shewing that, at this time (1826), she was labouring under a disordered imagination. He further

says, and it is not immaterial in connection with what appears to have occurred at this time, from 1826 to 1831, that he has heard the deceased say that Lord Melbourne and Lord John Russell came about there in the disguise of a man carrying about fish; that her manner of communicating this was in a sort of whisper, as if telling a secret she had discovered; and that upon every visit there was some extraordinary statement she made to him, some evidence of delusion in her. He concludes by saying that his decided opinion of her is that, during the whole period of his acquaintance with her, she was a person of unsound mind, and incapable of making a will. This is his opinion, and these are the facts upon which his opinion is founded, and although I agree with Counsel that great reliance cannot be placed upon an opinion given after a great lapse of time, yet, as this witness states the facts upon which his opinion is founded, I think it is very important evidence, as far as the facts and his opinion coincide. This gentleman was examined before the Commission in 1841, when the Jury found the deceased insane from 1836; but the Jury did not negative unsoundness of mind at an earlier period, and the evidence before them may not be the same as that produced before this Court: so that the verdict is not to bar the Court from carrying the insanity back to an earlier period.

Another medical gentleman, Mr. Neville, was in the habit of attending the deceased from July, 1827, until January, 1828, and again from June, 1833, until February, 1834, the month before the will is dated. He says she was a person of good manners and lady-like behaviour, but that, at times, her conversation and manner exhibited strong evidence of her being a person of unsound mind. He says, "The principal feature of her insanity was that of her supposing that persons of various kinds were in love with her. In the early part of my acquaintance with her, I found her labouring under the delusion as to men in general, including her own male servants, that they were enamoured of her; I can mention in particular the late Sir Edmund Nagle and Sir Robert Ker Porter, who were our mutual friends. She spoke of herself as pitying their feelings, and expressed her sense

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of the necessity of discouraging them. She expressed herself in like manner respecting her own men-servants, and the necessity she was under of parting with them, in consequence of their having exhibited the same amatory feeling toward her." Her manner and expression of countenance corresponded with her declarations, and were such as to establish the undoubting conviction of her being under a delusion and insane. "Evidence of this delusion occurred again and again, a confirmed and established delusion." He saw he received a letter from her "in a rambling strain of remonstrance and admonition," confirming his opinion as her deluded state of mind, "that of entertaining such notion of her attractions that no one could help an excessive admiration of her, which she pitied, but felt it her duty to check." He is of opinion that though, on several occasions, her conduct and conversation were like those of ordinary persons, the delusion he speaks of "was always present to her, though not always evinced."

Here, therefore, are two medical gentlemen speaking to what occurred under their own personal observation. It has been said that they give inconsistent accounts, different delusions being deposed to by each; and this is true, Mr Stilwell making no mention of her amatory delusions. But because she did not make the same declarations and develop the same delusions to each of these gentlemen, are their two accounts inconsistent with each other? Both concur in opinion that, at the time they saw and conversed with her she was in a state of insanity and derangement, and I see no reason to doubt that they have both given correct accounts, or that their opinion was not the one formed at the time, and not (as suggested by Counsel) influenced by the verdict of the Jury.

But there are other witnesses. The deceased, in the year 1829, took into her family, from the Foundling Hospital, a young person named Jane Arundel, who was apprenticed to her, and she remained there from October, 1829, till November, 1832. The deceased took her with a view to adopting her, and it appears from the evidence of Jane Arundel (now Jenner) that, for half a year, from January

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1830, being then about sixteen, she was placed at a boarding school. The witness states the manner in which the deceased treated her. She never suffered her to do any work in her house. At first she slept on a separate bed in the deceased's room, but after a while she had her to sleep with her in her own bed. In the day she was with her in the parlour. Occasionally she was sent to the top of the house, as a punishment. She was not allowed to speak to any servant; she was beaten by the deceased, not very severely, never but with her open hand, but without deserving it; for instance, the deceased's brother having come there, though the witness did not turn her head towards him, as soon as he was gone, the deceased beat her, tore her hair and her cap, and then locked her upstairs. Now is this the conduct of a woman of sound mind? It is quite impossible to reconcile it with soundness of mind. Whether these facts alone would be sufficient to establish insanity is another question; but it is consistent with other parts of the case. The witness says: "She used to talk to me in a very indecent manner. I did not then know the meaning of much that she said; but since I have been a married woman, I have understood what she meant, and it was very improper in her to talk to a girl such as I was in the manner she did." Other witnesses depose to the same effect, and it is impossible to reconcile such behaviour with soundness of mind. The witness goes on to say that the deceased used to sit up after the servants went to bed, looking below stairs, as if to see that no one was hid; that she used to mutter very much, and laugh at times,—a silly laugh; that she was always upon the watch, as if for something that was expected to happen. The result is, that the witness perfectly believes that the deceased was out of her mind whilst she was with her. Upon interrogatory, she says the deceased was very kind to her, at times, and kissed and made much of her after she had caused the witness to cry. She also states that the deceased expressed a belief that certain ladies had made faces at her, which the witness has no doubt was an imaginary idea. At length, the girl was removed by the Governors of the Hospital.

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Mrs. Bishop went to reside with the deceased from June 1832, till March, 1833, as a companion ; and she appeared to her, when she first went, to be a clever, agreeable woman. The first mark of singularity in her, which the witness thought was insanity, occurred on the deceased's return from a visit to Brighton, where, she told her, "the band had been stationed at her door, to play before her, and the officers had come forward to pay their respects to her." Is this anything more than mere imagination ? She then speaks of the deceased's violence of temper towards Jane Arundel ; of her extreme suspicion, which was of an irrational kind, at of her shaking her head in a cunning and determined manner, saying "I will be a match for them," as if with reference to some apprehended scheme : thus confirming the evidence of Mr. Stilwell. She also confirms the testimony of Mr. Neville, by deposing that the deceased's expressions, in speaking of those who, she said, were in love with her, were a chief reason for the witness leaving her. She mentioned Sir Edmund Nagle, the late Mr. Thesiger, and Sir Frederick Flood, as having made proposals of marriage to her, "and she would then repeat expressions, as having been used by them, and describe conduct on their part towards her, so gross," that the witness was obliged to leave the room, and declares it is quite impossible to repeat them, they are so offensively and disgustingly indecent : hereby confirming the evidence of Jane Jenner. Mrs. Bishop describes the deceased's treatment of this young person, who, she says, was a very good girl. She was confined in a room by herself, and fed by the deceased with a wantonness of cruelty ; every bit of meat that was uneatable was cut off for her, and every thing was taken from her by which she might amuse herself. She once bit the girl's thumb, and the witness frightened the deceased by almost threatening her with an application to a magistrate. At last, she made such assertions about the girl, and brought such false charges against her, of forming assignations with men, and told such stories about signals she had seen between the clergyman of the parish and the girl, that the witness applied to the Governors of the Foundling Hospital, and she was removed.

The witness mentions other acts of the deceased, which made her at last afraid of her, and she is most decidedly of opinion that the deceased was then of unsound mind, and incapable of doing any act requiring rational thought, judgment, and reflection. The witness has been interrogated as to various matters; but I see nothing in her answers which at all reflects upon her character.

Another witness as to this part of the case is Mrs. Bunn, who lived with the deceased as cook from June, 1830, to March, 1832. She says she was a very odd lady,—odd in her manners, odd in every way, not like a right person. She would walk up and down her hall for hours together, shaking her head, and talking to herself, and when she came to the end, would knock down the stick she walked with on the floor, in a determined way, as if she said to herself, "It shall be so." She was irritable in her temper, and would be in a passion about nothing; she accused her servants of stealing from her room, into which they could not enter; "what with her dress, the stick she carried, and her appearance altogether, she looked like an old witch," and the boys would say of her, "Here comes old Sal!" The witness states that Jane Arundel was locked up by the deceased, or kept away from the servants; but she never saw her beat the girl. She believes that the deceased was not right in her mind. To be sure, Mrs. Bunn admits that she believes in ghosts, and that she saw one. This might be nightmare; but suppose it were otherwise, what argument does that afford against the statements of other witnesses as to the delusions under which the deceased laboured respecting Lord Melbourne and Lord John Russell going about as fish-men, and about her own personal attractions?

It is impossible to deny that these witnesses do establish a case of unsoundness of mind, evidenced by general eccentricity of conduct, and by particular acts, and by allusions to circumstances evidently the effects of a disordered imagination. There cannot be a doubt, if these witnesses are to be relied upon, that the deceased was at that time in a state of actual derangement. But this would be merely to depend upon the oral testimony, confirmed, to

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a certain extent, indeed, by the letters to which I have adverted. There is, however, a great number of the deceased's letters, written before and after the time when Mrs. Bishop left her, beginning in June, 1827. One, an important letter, dated 10th August, 1827, is addressed to her brother, Mr. Thomas Waring :—

My dear Tom,—I am so amazed at our meeting in London that I wish you could unravel the mysterious circumstances. I am not at all affected by any thing. My pure conscience would enable me to face the devil if he was set before me, and I have fortitude to meet a spectre in the churchyard at midnight, if alone ; but with your fellow-man I am afraid to have communion. There is something *afloat* which I cannot understand.—I say *afloat*, because I cannot detect what it is. There is nothing that can attach to me ; yet I should like to know if any thing is meant.

Here is a letter which it is impossible should have come from a person in her perfect senses. Again, in a letter, dated 16th November, 1832, written to her sister, Mrs. Nash, the deceased complains of the conduct of Jane Arundel, and of Mrs. Bishop ; but if any credit is to be given to those witnesses, there is proof that all this was mere imagination.

Before I proceed to the letters written after 1834, I will advert to the evidence of two persons named Smith. Sarah Smith was inspectress of the Foundling Hospital at Chertsey, who saw the deceased in consequence of being desired to inquire into her treatment of Jane Arundel, and she says that, in speaking of the girl, she was so excited as to be quite irrational ; “ then there was her wild, mad eye, very observable, and her excessive suspicion of every body, fancying that she was to be poisoned.” The witness adds :—“ I have been used to a mad person, having had the care of one for many years, and I have no hesitation at all in saying that Mrs. Gibson was out of her mind.”

Mr. Richard Smith, her brother, is a surgeon, who went to the deceased's house, at the request of his sister, to see the girl Jane, and from the appearance, deportment, and

conversation of the deceased, he judged she was deranged, and recommended the girl's removal.

Now Mr. Neville had seen the deceased so late as February, 1834,—that is, immediately before the date of the will,—and up to that time, at least, there can be no doubt that her state of mind, which, it has been suggested, may have been the effect of a certain constitutional change in 1825, continued up to February, 1834, when there is reason to believe that she laboured under the same delusions as in 1825 and 1826, the proof of which consists of a chain of oral testimony almost complete, and confirmed by her letters. There is no letter immediately preceding the date of the will, and the answers of Mr. Thomas Waring to the deceased's letters are not produced. Why they are not produced is not apparent: it may be, as alleged, because they would afford no proof of the insanity of the deceased; yet the delusion might be still existing in her mind, and might be developed, though not referred to in the letters, and the Court must consider that this was a permanent, not a temporary, state of mind in the deceased.

Then we come to consider what occurred shortly after the date of the will. If we find the same delusions continuing shortly after the will, it will be impossible to say that, because the will is a rational act rationally done, the Court is to infer a lucid interval. There is a letter dated 29th October, 1834, as wild as any hitherto referred to by the Court. There is a letter written by the deceased, dated 10th February, 1835, addressed to the Rev. Mr. Elers, which has been produced by the other side, to shew that the deceased was fully competent, and undoubtedly all the first part of the letter is admirably written,—a better letter was never penned; at the same time, this letter furnishes the strongest possible proof of the permanency of the delusions under which she was labouring. After expressing herself with perfect propriety respecting the death of Mr. Elers's mother, she says, at the conclusion:—

I am now to make observations in the spirit of inquiry, and I entreat you to set me right. In every church in England and Scotland where I have attended Divine Service, I have invariably

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seen the natural visage of the then officiating clergyman. In my own parish church, our curate, Mr. A., never wears his own countenance. He is occasionally assisted by the Rev. Mr. H., who resides at B., the next parish, whose father held that Living, and was also chaplain of Chelsea Hospital. The son has lost both these presentations, and the Rev. Mr. S. has B. This gentleman adopts the same disguise—until properly explained to me I must call sacrilege. I conceive that the purity of our Divine Service ought to be administered by individuals in the purity and holiness of unaffected simplicity. My health will not allow me to go to church in the winter, and I have entirely withdrawn from the altar so administered here. If you say that I am in error, I shall be most ready to correct myself.

This shews the continuance of the delusion on her mind, that persons were constantly assuming the appearance of others, and that it broke out upon the slightest occasion. I say this is the strongest proof of this being a permanent impression upon her mind, and which, though for a time discarded, by the slightest circumstance is made to develope itself again.

Mr. Elers, who was acquainted with her from 1832 to 1837, deposes that the deceased was not of unsound mind; but he and the other witnesses were not in possession of all the facts, and if there had been only this letter, the Court might come to the same conclusion he has adopted, namely, that the deceased meant no more than that the clergymen distorted their countenances and changed their voices in performing the Service, as Mr. Elers says some of the clergy do. But she speaks of their assuming other persons' countenances, though the same letter shews she could write upon other subjects in a proper manner; but the moment any thing suggests to her mind a particular delusion, it is revived and developed.

(After reading other letters, dated in 1835, including one to the Duke of Wellington.)

It is quite impossible to read these letters and not see that they are the offspring of disordered imagination and of delusion. From the beginning to the end, they all come to the same point, to establish the existence of delusions at the time they were written, and they go on till February, 1841,

all on the same subjects, of persons appearing in disguise, and coming to her for improper purposes. I say these letters not only prove the existence of delusions, but they confirm the evidence of the witnesses as to circumstances not referred to in the letters, establishing to the satisfaction of the Court the existence of delusions in the mind of the deceased before and at the date of the will, and afterwards, up to the time of her death.

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The evidence of the witnesses on the other side goes to shew that the deceased was a person of perfectly sound mind, not entertaining any of these imaginary notions. Amongst these witnesses are persons in a station of life which would induce the Court to rely upon their testimony, as giving the true impression made upon their minds, as to the conduct of the deceased. But these persons were not constantly about her; they visited her occasionally, but had not the same opportunity as the others of knowing her habits, and were not acquainted with the letters written by this lady; and though it is clear that, on many occasions, she did conduct herself with perfect propriety, it is equally clear that, when something gave rise to the exhibition, she at once shewed the continued existence of the delusions that were lurking in her mind.

Mr. Elers saw her first in 1832, and he corresponded with her by letter, and we all know that persons labouring under delusions are able to restrain themselves; but still, looking to the evidence as to her condition at a later period, there can be no doubt that she was labouring under delusions at the time the letter to Mr. Elers and other letters were written: and this is the effect of the evidence of all these witnesses. Mrs. Elers deposes to the perfect propriety of the deceased in the management of all her concerns. Mr. William Elers, who had known the deceased for twenty-eight years, who paid him a visit in 1833, and in 1836 he stayed at her house two nights, is of opinion that she was of perfectly sound mind; but he knew nothing of the letters to which I have referred. Miss Susanna Lee, who frequently saw the deceased, and who paid her visits, staying with her from May to June, 1829, from March to May,

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1832, from October, 1834, to February, 1835, and from June to September, 1836, deposes to the same effect. She has a legacy of £500 in the will, and no doubt this has some influence upon her mind. She did not perceive even eccentricity in the deceased. She resided with her for considerable periods of time at each visit; but during those times, many of the letters shewing delusions were written by the deceased; and giving this witness every credit for stating her real opinion, I have it under the deceased's own hand that she was then labouring under delusions. Mrs. Alvarne, whose father was acquainted with the first husband of the deceased, used to visit and correspond with her from 1827, when she stayed with her between three and four months, till 1837, when she stopped with her for three weeks, and in the interval paid her several visits; and she never observed any delusions. Sarah Roots, a servant of Mr. Wm. Elers, saw the deceased in 1833, 1834, and 1836, when she (with Mr. Elers's family) stayed at the deceased's for two days, and she did not discover any symptoms of insanity. There is a letter from the deceased, at this time, dated 15th April, 1836, in answer to an application from Mr. Elers to stand godmother to his daughter; the deceased acquiesces, and nothing can be more proper than this letter. But the letters, shewing the continuance of delusions, forming a long chain, a consecutive series, of documentary proof, are stronger evidence than any produced to control it. The case is that of a person originally of an eccentric mind, eccentricity being followed up by delusions.

Some of the witnesses called to establish the capacity of the deceased depose to facts which, in conjunction with the other evidence and the letters, satisfy my mind that she was not in a state of capacity, and afford decisive proof of delusion antecedent to the will. It is established beyond all doubt that she was labouring under the delusion that her brother, Mr. Thomas Waring, had appeared in the neighbourhood in disguise, and that he had turned Roman Catholic. It is quite impossible, therefore, to say that she wrote the will in a perfectly sound state of mind, and that

it was a rational act rationally done. According to the doctrine of this Court, it is not necessary that the delusions should appear on the face of the paper disposing of the property in order to invalidate it; the moment you prove the deceased to have been of unsound mind, she is not competent to make a will unless a lucid interval is proved; but I have not evidence to authorize me in holding that there is proof of a rational disposition executed in a rational manner.

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Then there is the state of the paper, a will disposing of real as well as personal property, with a full clause of attestation and no witnesses. Every person is presumed to know the law, and that a will disposing of real property must (at that time) be attested by three witnesses, and the clause shews that she intended to have it attested: this proves that the will is not so perfectly rational an act as has been suggested.

Then what is the codicil? The codicil is an imperfect instrument in itself. It purports to be a codicil to the will, and begins in a very formal manner; but not only is there a want of signature and of date, but the writing in the margin, "2 witnesses," shews that it was the deceased's intention that it should be attested by two witnesses: so that it is no confirmation of the will.

Without going further into the case, I am of opinion that this is not the will of a person who was of sound mind at the time the paper bears date; that it is proved that, both before and after the date, the deceased was labouring under delusions on various subjects, not all seen or disclosed at the same moment of time, but all existing; and I am of opinion, upon the whole, that the Court is bound to pronounce against the validity of the papers propounded.

Conclusion:

Papers pronounced against.

It is a case, undoubtedly, which Major Waring was bound to bring before the Court; I think he was bound to propound the paper, and take the result of it. Many of the facts he was ignorant of; under these circumstances, therefore, the Court has no doubt that he is entitled to have his expenses paid out of the estate. Many of the letters were not produced before the Jury; I presume, if they had been before them, the Jury would not have confined the in-

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sanity of the deceased to 1838, but would have extended it (as Mr. Stilwell thinks they ought to have done) to a much earlier period. However, this Court has evidence before it which the Jury had not, and with respect to the argument that Mr. Thomas Waring had endeavoured to carry back the insanity of the deceased antecedent to the date of the will, the will was not found until November, 1841, so that he could not have had any particular reason to assign any precise period for the commencement of the insanity. If he had had the will in his possession and had known the contents, he might have endeavoured to carry back the insanity antecedently to the period when it is dated: but the will was not found until after the verdict of the Jury. Therefore, I pronounce against the validity of the will and codicil, and decree the costs of the party propounding them out of the estate.*

Proctors:—*Farquhar*, for the party propounding the will; *Dyke*, for the next of kin.

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Suit for restitution of conjugal rights by the husband against the wife, who, in defence, pleaded cruelty and adultery on his part, neither of which charges was sustained. — The evidence of a single witness to

SIMMONS v. SIMMONS.—*Cause.*—This was a suit for restitution of conjugal rights, brought by Mr. John Simmons against Mary his wife. The Libel, which was admitted without opposition, pleaded the marriage of the parties on the 20th October, 1842, he being a widower, and she a widow; that they cohabited together at divers places until the 3rd May, 1845, when Mrs. Simmons, without lawful

* This case has been reported with greater fulness, that it might be more exactly compared and contrasted with that of *Mudway v. Croft* (2 Notes of Ca. 438), which in some points it strongly resembles.

cause, left the residence of her husband, and has never since returned, and refuses to cohabit with him. On the part of Mrs. Simmons, an Allegation was admitted without opposition, which pleaded as follows:—

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1—3. The marriage and cohabitation until 3rd May, 1845. 4. That, shortly after the marriage, viz. on the 10th November, 1842, the parties went to live at Frimley, Surrey, in a house provided for Mr. Simmons by the Basingstoke Canal Company (in whose employ he was), where they lived until the 21st December; that, during such time, he treated his wife with great neglect, indignity, and cruelty, on several occasions kicked her in bed, and once attempted to strangle her; that he often absented himself from home all night, frequently scolded and abused her without just cause, and also instigated one of his servants to disobey her orders, and treat her with disrespect; that by such and other means he rendered her home so uncomfortable, that, on the 21st December, 1842, she quitted it, and returned to her own house, in Lower Belgrave Place, Pimlico, where she had resided prior to her marriage, and where her daughter by her former marriage, Emily Kerr (wife of William Kerr), was then resident. 5. That he sent messages to her, threatening to post hand-bills in that neighbourhood, to prevent persons giving credit to her in his name, she being possessed of a small independent property, part of which, on their marriage, had been settled on Mr. Simmons in reversion, if he should survive Mrs. Simmons; that she having placed herself under the protection of her sons by her former husband, Mr. Simmons had an interview with Mr. Lewis Glenton, her eldest son, to whom he admitted having been to blame in his ill-treatment of his wife, and promised amendment if she would return, and that she should be at liberty to leave him if she did not find herself comfortable. 6. That she was induced by these promises to return, and she continued to live with him at Frimley from December, 1842, or January, 1843, until May, 1844, save occasional absences at her house in Belgrave Place; that during this period Mr. Simmons treated her with the same indignity and cruelty as before, endeavouring systematically to annoy her, frequently absenting himself from home, leaving her alone in the house (which was situate at one of the most lonely parts of Bagshot Heath), with only a servant, for days together; that, when at home, he was in the habit of sitting up at night, and lying in bed all day; that he often absented himself from her bed at night; flew into passions with her on the most trifling occa-

the fact of adultery, she being an accomplice in the act, is insufficient without corroborative evidence; that is, evidence not merely shewing the probability of the account given by the witness, but proving facts which are *ejusdem generis* with her evidence, and tend to produce the same result.—Where a party interrogates his professional adviser, who had been examined by the adverse party, as to matters respecting which the witness was protected from answering by professional confidence, he waives his privilege.

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sions; was in the habit of declaring that he hated the sight of her, and on several occasions threatened to strike her, declaring that he would dash her brains out, at the same time (on more than one occasion) brandishing a candlestick in a menacing manner over her head; that, in order to annoy and vex her, he was in the habit of ridiculing religion in her presence, laughing at her for going to church, and asserting his disbelief in the Holy Scriptures; that Mrs. Simmons supplied him with as much money as circumstances admitted, notwithstanding which, he was in the habit of accusing her falsely of spending her money improperly, declaring to her frequently, in the presence of other persons, "Damn you, Madam, what do you do with your money? You must keep a man in town." 7. That in January, 1843, he kissed and attempted to take indecent liberties with (Mary) Betsy Smith, one of their servants, then about fourteen years of age, who resisted and repulsed him, and he offered her a shilling not to tell any one of what he had done, which she refused, and immediately informed Mrs. Simmons thereof, who remonstrated with her husband, upon which he flew in a violent passion, abused her in the most opprobrious terms, and discharged the servant. 8. That, in May, 1844, Mrs. Simmons, whose health had suffered from her husband's neglect and cruel treatment, returned to her house at Lower Belgrave Place for change of air and scene, and remained there for some time without seeing or hearing from her husband; that, about Michaelmas, 1844, on learning that he had been discharged from his situation, she supplied him with sums of money, amounting to £400, for the purpose of making a small house at Weston Green, near Kingston, suitable for their residence, he residing with her, in the meanwhile, until December, 1844, at Lower Belgrave Place, during which time he constantly abused her, particularly when she was unable to supply him with money. 9. That, on the 5th December, 1844, Mrs. Simmons joined her husband at Weston Green, and lived with him there until the 3rd May, 1845, during which time he continued his ill-treatment of her, on several occasions kicking her in bed; that he was incessant in his abuse of her, frequently told her that he hated the sight of her, and threatened to kick her out of the house; that he instigated the servant, Johanna Dempsey, to insult her, and was in the habit of declaring to her that if she would allow him £200 a year, he would never see her again. 10. That since the 3rd May, 1845, Mr. Simmons has never asked her to return to live with him, and during such time she has supplied him with money, notwithstanding which, he, with a view to extort more

money from her, in February, 1846, caused an Execution for a fictitious debt of £247 to be put into her house in Lower Belgrave Place, under which all her furniture and effects were sold off, at the suit of a person named Bryan, with whom Mr. Simmons was on intimate terms. 11. That on the 10th February, 1846, Mrs. Simmons, accompanied by Mrs. Glenton, her daughter-in-law, Mr. Gange, a neighbour, and his man, proceeded to Weston Green for the purpose of having an interview with her husband, and also of fetching away some clothes of hers; that on their arrival, about 3 o'clock P.M., they found he was still in bed, but she having apprised him of her arrival, he rushed half-dressed into the room where she and her daughter-in-law were, flew at her, and gave her a violent blow with his clenched fist on her right breast, the marks of which were afterwards visible; that on Mrs. Glenton interfering to protect her, he pushed her (Mrs. Glenton) back with great violence, and hurt her foot very seriously; that having overpowered and terrified them both, he locked them in the room for two hours, till they succeeded in bursting open the door and effecting their escape. 12. That in January, 1846, Mr. Simmons was attended upon by Sarah Bish (wife of a labourer), as charwoman, with whom he carried on an adulterous intercourse. 13. That Sarah Bish is well known to be a person of loose character, and that Mr. Simmons has been accustomed to visit her at her house, which is well known as a house of ill-fame. 14. That, since May, 1845, Mr. Simmons has frequently associated with strange women of loose character, at Weston Green, and also at Kingston.

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Additional Articles were afterwards brought in, on the part of the wife, and admitted (upon affidavit that the facts were not known to her until 9th October, 1846), which pleaded that Mr. Simmons, very shortly after his marriage with Mrs. Simmons, renewed his connection with Lucy Peacock, with whom he had cohabited prior to his said marriage, and by whom he had had a child; that he carried on an adulterous intercourse with her from such time until very shortly only before Michaelmas, 1844; that during such period he was accustomed to ask Lucy Peacock, "whether, if he married an old woman with a deal of money, she would live with him, as he could then do more for her;" but he entirely concealed from her his marriage with Mrs. Simmons; that, on being discharged by the Basingstoke Canal

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Company, he discontinued his connection with Lucy Peacock, and shortly afterwards, on the 2nd November, 1844, with a view to break off such connection, he wrote a letter to her father, in which he falsely represented that he intended starting with his family for Hambro', with a view to remaining abroad; that during his criminal intercourse with Lucy Peacock, he corresponded with her father, and supplied him with money for his daughter and her child, and also visited her at her father's house, and met her by appointment at other places, upon many or some of which occasions they committed adultery together.

An Allegation was asserted on the part of the husband, which was afterwards waived.

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Feb. 26.
March 6.
ARGUMENT.

Phillimore, Dr., for the wife.—We appear in our own defence; we plead, and the husband says nothing to the charges. With regard to the cruelty, there is proof of a blow and of bruises shewn. Facts may be good in bar to a suit for restitution which would not support an original suit for a divorce. *Forster v. Forster*.* Adultery is proved by Lucy Peacock, and indecent liberties by Mary Smith. There has been great tampering with the witnesses on the part of the husband.

Bayford, Dr., on the same side.—The bringing of this suit is a continuation of the persecution of the wife, the object of the husband being, not her society, but her money.

Addams, Dr., for the husband.—The wife has totally failed in her defence, notwithstanding the attempt to support it by perjury and subornation of perjury. There is nothing like proof of either cruelty or adultery.

April 22.
JUDGMENT.

DR. LUSHINGTON.—This suit commenced as a suit for the restitution of conjugal rights, brought by the husband. The defence of the wife was, that Mr. Simmons had committed adultery and cruelty, and this defence she pleaded in an Allegation, admitted on her behalf. Subsequently to the admission of that Allegation, Additional Articles were admitted, alleging other adultery committed by the husband;

* 1 Hagg. C. R. 144.

and I do not hesitate to say that the most difficult part of this case arises from the consideration of the evidence given on those Additional Articles.

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The marriage took place on the 20th October, 1842. The Citation was returned on the 11th February, 1846. When and how the parties separated may be a subject of discussion; but it is pleaded to have taken place on the 3rd May, 1845. Both the parties had been previously married, and each of them had a family by the first marriage. Mr. Simmons was in the employment of the Basingstoke Canal Company. Mrs. Simmons had an income settled to her own use, of which the net proceeds are stated to be about £600 a year. At the time of the marriage, Mr. Simmons was residing at Frimley; Mrs. Simmons had a house at Pimlico, in which her daughter, Mrs. Kerr, a married person, but separated from her husband, lived with her. This is the history of the parties in the cause. Mrs. Simmons, about one month after her marriage, went to her husband's house at Frimley. Her stay there, however, was but short, for on the 21st December she returned to town.

It has been argued that the object of Mr. Simmons in bringing this suit is to obtain money. It is not improbable that this argument may have some foundation in fact; but assuming that it has, I am not satisfied that even the conviction of the Court, founded upon credible evidence, that such was the fact, can, with a due regard to legal principle, materially affect the judgment of the Court. It is not the motives of the suitors which the Court sits here to scan; its judgment must be founded on the acts done by them. I apprehend that the law has told me that I must pronounce a decree to return to cohabitation in a suit for the restitution of conjugal rights, unless adultery or cruelty be proved. How far less stringent evidence can be received by way of defence I have considered in former cases, and to the opinions there expressed I adhere. Supposing the sole object of Mr. Simmons in instituting this suit had been to obtain the advantage of his wife's fortune, it would be useless to discuss the effect of such a motive. I know of no authority which declares that an individual instigated by such a

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motive is debarred from obtaining a sentence of restitution unless the wife had a defence in law, namely, the commission of adultery or cruelty on the part of the husband.

I proceed then to examine the proof as to cruelty and adultery, for I must have proof of one or the other of these charges. Evidence however conclusive of something short of either will not suffice, for I am not invested with any discretionary power to relax the requisites of the law, and am not disposed to introduce uncertainty into the system established. I have neither authority nor, indeed, inclination to do so, believing, as I do, and as I have often said that nothing could be more prejudicial to the public interest than the rendering a legal separation of husband and wife more easy than it is.

I wish to notice another argument which was much pressed in this case; that the husband had not given any plea or produced any witnesses. It appears to me that to the utmost length to which this argument can be carried is, that the husband has no witnesses to contradict the evidence given by those produced on behalf of the wife: such being an inference fairly to be drawn, because it must be for his interest to contradict it, if necessary and practicable. But still the *onus probandi* is on the wife, and she must succeed by the strength of her own evidence.

Plea of cruelty. The first charge of cruelty is pleaded in the 4th article. The ill-treatment is alleged to have taken place between the 10th November, 1842, and the 21st December, 1842, very soon after the marriage. Now it is unquestioned and unquestionable, that if a wife willingly cohabits with her husband after an act of cruelty, such cohabitation operates as condonation; or, in other words, that the wife can never after such cohabitation, found on that act of cruelty a matrimonial suit, unless the cruelty be revived. The parties are pleaded to have lived together at intervals until the 3rd May, 1845; prior acts of cruelty, therefore, are condoned if not revived. I think, therefore, that the most expedient course is to consider what acts of cruelty led to the separation, or, in other words, revived the previous cruelty, if committed.

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It appears that Mr. Simmons, after quitting his house at Frimley, went to reside at Weston Green, near Kingston. During the years 1843 and 1844, Mrs. Simmons was frequently absent at Pimlico; but, as pleaded in the 9th article of the Allegation, on the 5th December, 1844, she joined him at Weston Green, and there she resided, at intervals, till the 3rd May, 1845. All cruelty prior to the 5th December, 1844, was necessarily condoned. I must now consider what took place afterwards.

In the same 9th article, personal violence is distinctly stated in the plea; but there is no averment of any particular act of violence which led to the alleged separation. Why or wherefore the separation took place on the 3rd May, 1845, the Court has no information. Certainly such absence of information, both in plea and proof, is somewhat extraordinary; unprecedented, indeed, so far as my recollection goes. Mrs. Kerr, the daughter of Mrs. Simmons, has been examined on the 9th article. She was at Weston from 10 o'clock on the 20th December to 11 o'clock on the 21st, and no more. She speaks of certain complaints made by her mother of ill-usage on the 20th and 21st December; but supposing all these complaints well-founded, and that the mere declaration of the mother to the daughter were evidence of their truth, the parties continued to cohabit for four months afterwards. This witness proves no revival. The only other witness on this article is Johanna Dempsey. Her testimony does not support it even in the slightest degree. She proves that Mrs. Simmons went backwards and forwards, and spent her time between Weston and Pimlico, just as she pleased. In fact it appears that the only reason for fixing upon the 3rd May, 1845, as the date of separation, is, that Mrs. Simmons did not return to Weston after that day. There is an end, then, of all revival of cruelty up to this time, for the condonation is complete, and I must violate every principle heretofore acted upon if I held otherwise. I should be very much disinclined to press the rule of condonation beyond authority and precedent; because I know that, in many cases, there may be great difficulty in a wife withdrawing from her husband's bed and from his

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house. In some cases of cruelty it may be very difficult to say when the cup of sorrow overflows, and when the abandonment of the husband's bed and roof becomes imperative upon a wife. But, in the present instance, the wife goes to and fro according to her pleasure ; or, if Dempster is not to be believed, remains a quiet inmate under his roof, and she then quits for no cause alleged or proved.

But in truth this discussion is hardly necessary, for the plea does not describe the facts with fairness. Two letters written by Mrs. Simmons, after the alleged separation, speak a different state of things. The letters I refer to are those marked B. and C., in the handwriting of Mrs. Simmons herself. Bearing in mind that the separation is pleaded to have taken place on the 3rd May, 1845, let us see the contents of the letter dated 28th July, 1845. It commences, " My dear Simmons : " here is this lady addressing her husband in this manner in July, 1845, when the plea is so drawn as to induce the Court to believe that she had separated herself from him, through fear of personal violence, on the 3rd May, 1845. Whether or not a defensive plea should be so drawn, which is at variance with the truth of the case, may be a matter of consideration.

My dear Simmons,

It would have given me great pleasure to join you in your trip to Jersey if I could leave town with any certainty or comfort to myself in regard to my affairs and money matters, but I cannot ; therefore I must forego that pleasure. I hope you will enjoy yourself, and that you will find the little fellow well and happy. The collars you will find on one of the shelves in the wardrobe.

And remain,

Yours truly,

Mary Simmons.

Now certainly I think it would require very great ingenuity to reconcile this letter, written by Mrs. Simmons in answer to an invitation of her husband, with her abandonment of his roof and bed, on the ground of a fear of personal violence. But I go to the next letter, which is dated the 28th June :—

My dear Simmons,

I write to say, we are all going to Woolwich this afternoon for a few days. My son Jim informs me Sir Thom: Wilson's grand fete will take place on Thursday next, and, therefore, we shall not return until after that day; so if you should feel inclined to join us, we shall be glad to see you. Monday, you know, is your birth-day. We have not seen Mrs. Morgan, altho' I wrote to her the day John came to town; she may be out of town for ought I know. I sorry the weather is so wet; that may have prevented her coming. Mog returns on Monday, as she does not wish to go to the fete, besides she has some parties coming into the first floor, and she will be wanted. I fear you will be very dull; you had better come up.

in great hast,

Yours,

M. Simmons.

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Here is a letter of invitation to Mr. Simmons to join a party of pleasure. I apprehend I am to take the contents of this letter to have been written truly and sincerely, from the feelings and conviction of this lady,—and there is no pretence for saying it was written with any other view whatever,—and if so, it demonstrates that, being written after the alleged separation, she had not quitted her husband's roof from any fear of ill-usage. I doubt, indeed (or rather I do not doubt), if, at the time, it was a separation at all; I incline to believe, especially from the letters, that the wife's determination not to return was formed long after.

Up, then, to the time, or about the time, when the Citation in this cause was issued, there is no cruelty upon which the Court could legally act. Save from the letters, I know very little of what passed from May, 1845, to February, 1846, except that Mrs. Kerr, on the 10th article, deposes to the parties sleeping together at Mrs. Simmons's house at Pimlico, in June, 1845, and that in the teeth of the article pleading the separation on the 3rd May! a circumstance wholly unnoticed in the plea, which is so framed as naturally to lead to a totally contrary conclusion: it is an attempt to practise a deception upon the Court, for it leads to the conclusion that Mrs. Simmons quitted her husband's

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house on the 3rd May, in consequence of ill-usage, and did not cohabit with him as his wife after that period.

I think I have said quite enough to shew the propriety of dismissing, for the present at least, all reference to transactions prior to February, 1846.

The 10th article pleads that in February, 1846, Mr. Simmons caused a fictitious Execution to be put into Mrs. Simmons's house at Pimlico, and for the purpose of extorting money from her. If this fact be proved, it is one, no doubt, of great moral iniquity, and of gross and unjustifiable oppression; but I do not apprehend that I could found any judgment upon it, as a substantive act of legal cruelty. I am not aware of any authority which would enable me, however well inclined, to decree a separation on such a ground. Such conduct, however censurable, does not import danger to life, limb, or health, the boundaries within which I am confined by the law; it does not savour of personal violence in the slightest degree. The only consideration to which I am justified by law in adverting, in a cause of cruelty, is danger to life, limb, or health. Such acts may, indeed, shew the *quo animo* of the husband, and so bear upon other parts of the case; but, *per se*, I think this conduct, if proved, does not fall within the limits which the law has prescribed for my governance. A separation for cruelty stands upon the sole ground of necessity for protection.

The preceding observations are made upon the supposition that these averments, as to a fictitious Execution, are proved. I must now look to the evidence upon this point.

Mrs. Kerr can prove nothing but the fact of the Execution being put into the house: all the rest is with her surmise. The action was brought by a Mr. Bryan against Mr. Simmons. The evidence of Mr. Lister, a solicitor, was resorted to. He is not, as appears, examined on the 10th article, which alone applies to the execution; but (I know not how this happened) on the 11th article. There is only one way to account for this, namely, by supposing that the Examiner has made a clerical mistake. That is the only way I can account for it, and I must take it that it is a cle-

rical mistake: I conceive it must be so, and that in fact he was examined on the 10th article. Up to the 7th February in that year, Mr. Lister had been solicitor to Mr. Simmons. He was not concerned as such with respect to the Execution; but he deposes that from what occurred between Mr. Simmons and himself, during the time he was acting for him, he does not believe that any debt was owing from Simmons to Bryan. Now the privilege of being protected from giving evidence, by reason of professional confidence, is, as every one knows, the privilege of the party, and not of the solicitor, and as in the mode of taking evidence in our Courts there might have been some difficulty in taking the objection, I should, if the witness had not been interrogated, have been disposed to refuse receiving this evidence; but the party has waived this privilege by putting the 54th special interrogatory: therefore, I must receive this evidence, which is that, in the belief of Mr. Lister, founded on his knowledge of Mr. Simmons's circumstances, it was an Execution for a fictitious debt. The interrogatory itself expressly asks the witness whether he will venture to swear that it was a fictitious debt or not. I am of opinion that, after this interrogatory put to the witness, there was a complete waiver of the privilege of the party to shut Mr. Lister's mouth, as his solicitor, and to forbid his disclosure of facts which had come to his knowledge as his solicitor, as I am of opinion this fact did.

There is one other circumstance which I must not omit to mention: in the very beginning of February, Mr. Bryan comes down to Weston Green, and dines with Mr. Simmons.

I think that the evidence of these witnesses, taken together, and rebutted by nothing, does establish a strong *prima facie* case, that this Execution was put in by the contrivance of Mr. Simmons himself, and I do consider the transaction as most reprehensible. Legal cruelty I cannot call it; but it is very unjustifiable conduct, which may incidentally not be without effect. It demonstrates that Mr. Simmons is not restrained from pursuing his own views by considerations of what is just and right.

I now proceed to consider the charge of cruelty alleged

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to have been committed at Weston Green in February, 1846, pleaded in the 11th article. This was a voluntary visit on the part of Mrs. Simmons, and, as pleaded, for the purpose of fetching away some of her clothes. She went accompanied by Mrs. T. Glenton, her daughter-in-law, and Mr. Gange, a cabinet-maker, and his journeyman. These two latter attended, as Mrs. Glenton says, for the purpose, as she supposes, of assisting to bring the things away. I must now refer to Mrs. Glenton's evidence :—

We arrived at Weston Green, the house of Mr. Simmons, about two o'clock. He was at the time in bed, or was so stated to be by the servant: first of all, she said he was out, and Mrs. Simmons, thereupon, went into the house, and took a work-box from one of the rooms, and we then went up stairs, to a room which appeared to have been used as a bed-room. But, before this, the servant had stated that Mr. Simmons was not out, but was in bed, and Mrs. Simmons then desired the servant to ask her master for the keys of a wardrobe which was in the room I have mentioned. The servant returned with a message that if her mistress wanted the keys, she must go to him herself for them; and not being able to get them, and not choosing to go herself for them, from fear, as she at the time stated, of her husband's violence, she broke the wardrobe open with a chisel, or some instrument of the kind, which she had brought with her for that purpose, her solicitor having, in my presence, on a former occasion, advised her that she had a right so to open her drawers for the purpose of getting at her wearing apparel, in case she could not get the keys. Having opened the wardrobe, she was engaged in packing some of her dresses in a basket, which was there, when Mr. Simmons came into the room. He had only his trousers on, and had evidently only just got out of bed; it was then between two and three o'clock in the afternoon. He immediately in a very abrupt and uncouth manner addressed Mrs. Simmons, saying, "Well, madam, pray what do you want here?" She immediately told him that she had come for her clothes. He dared her to attempt to remove any thing at her peril, and thereupon a scuffle ensued between them: it commenced, as it appeared to me, by his striking Mrs. Simmons on the right shoulder, or rather on her breast. This I saw myself, and as he was attempting to close the door, I rushed forward to prevent it, fearing he might attempt to fasten us in. He pushed me violently back,

and in pulling the door to, he caught my foot therein, and very much hurt it. He got the door closed, and then locked us in. I as well as Mrs. Simmons entreated him to release us, but he declared that he would detain her, but would let me out by-and-by: to use his own words, "I had come there for my own pleasure, and I should stay there for his."

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Then there is a great deal of noise; Gange and his man came in and were turned out of the house, and the police were sent for; but nothing in the nature of absolute violence. They at length escaped, and the witness says:—

Mrs. Simmons was very much distressed and upset, and I knew she suffered considerable inconvenience from the blow given her by Mr. Simmons, and I was a good deal hurt by my foot having been squeezed in the door, and I also had a bad pain in my side; but from what that arose exactly, I cannot tell—whether he struck me, or whether it was in the effort to prevent the door being closed; for the truth is, I was so dreadfully alarmed that, just during the scuffle, I scarce knew what did occur.

On the 41st special interrogatory, she repeats this evidence in part, but not exactly in the same terms. She says:—

I swear that the Ministrant did on this occasion strike the Producent: but whether it was with his clenched fist, or open hand, I cannot swear The Producent did not rush at the Ministrant, and strike him with a screw-driver. She threatened to break a looking-glass, and I then exclaimed, "Oh, mother, don't, don't!" and I prevented her doing it The Producent might upon the occasion interrogate, whilst talking to the Ministrant from the window, have turned round and laughed; but I cannot swear that she did or did not do so, for I cannot recollect.

I have stated the substance of the deposition of this witness, so far as relates to the most important part of the transaction, namely, the alleged violence of Mr. Simmons towards his wife. Mr. Gange has been examined, but he was not present at any act of violence; but he says that he heard Mrs. Simmons complain of having been struck. Dempsey is the only other witness who can speak to facts of

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importance. Considering the manner in which she gives her evidence, and the whole of her conduct, I am of opinion that her statement must be received with great caution. If this witness is to be credited, Mrs. Simmons was the first aggressor.

The result of all this is, that all negotiations, as deposed to by Mr. Lister, for an amicable separation (nothing of this is stated in the plea), having failed, and the Execution having been put in, Mrs. Simmons determines to recover certain clothes and property of her own; and supposing (for I will give her the credit of the supposition) that the husband might be absent from home, she, with Mr. Gange, a cabinet-maker, and his man, provided with instruments for breaking open lock-fast repositories, proceed to Weston Green. Mr Simmons is, however, at home, but in bed. He, on a message being sent, refuses to deliver up the key. Mrs. Simmons proceeds to break open the wardrobe. Mr. Simmons comes in, and a scuffle ensues,—for this is the name the witness applies to it, and it is the only name which properly belongs to it. The utmost extent to which Mrs. Glenton can go, in the first instance, is to depose that, “as it appeared to her,” a blow was given by Mr. Simmons. Dempsey deposes to the contrary. Then comes the difference between the threat to break the looking-glass, and the threat to strike Mr. Simmons, the one deposed to by Mrs. Glenton, and the other by Dempsey.

I am of opinion that I cannot trust the sole evidence of Mrs. Glenton, so doubtfully given; she too not being an impartial witness and so distinctly contradicted, though I do not say that Dempsey is a person on whom I can place reliance. But even if I could trust Mrs. Glenton's evidence, yet, taken with all its concomitant circumstances, I should doubt if the act amounted to legal cruelty. I think that this charge of cruelty is not legally substantiated, consequently, that it cannot operate as a revival, and if so, I cannot pronounce a decree of separation on the ground of cruelty at all.

Charge of
cruelty not
proved.

Plea of adul-
tery.

I must now notice the charge of adultery and of indecent conduct attributed to Mr. Simmons. The act of indecency

towards Mary Smith is pleaded to have occurred in January, 1843. The witness is examined three years and a half after the fact, namely, in August, 1846, she being then eighteen, so that she was about fifteen years of age at the time of the alleged act of indecency.

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The witness deposes to the fact on the 7th article. There is no evidence either to support or contradict the witness,—indeed, as to the fact itself, there could not be. Emma Knight, the other servant, is not examined; but I doubt if her evidence, if taken, could legally have proved any thing. Without saying that this witness has deposed falsely, or that I discredit her, I think, considering her youth, the distance of time, the fact of her having been discharged, and no notice, as far as appears, taken of the circumstance at the time by Mrs. Simmons, my judgment cannot be affected by this occurrence.

With respect to the charge of adultery with Mrs. Bish, I shall dispose of it very briefly. I am of opinion that the proof wholly fails, and not only fails, but that there was no rational and justifiable pretext for the accusation. I consider it to be a trumped-up story from beginning to end, with very little regard to the character of the woman alleged to be *particeps criminis*.

With respect to all the previous questions, though I have felt it to be my duty to the parties and the public to discuss them at length, I have really felt no difficulty; but in regard to that which I am now approaching, I am free to confess that I think it deserves the most serious consideration, and that it is attended with more than usual difficulty: I advert, of course, to the adultery pleaded in the Additional Articles to have been committed with Lucy Peacock. Some questions of law, as well as of fact, will arise—of law and fact, whether Lucy Peacock be a single witness, and whether there be any and what evidence legally to be called corroborative.

Now Lucy Peacock stands in this predicament: first, she is, I presume, a single witness to the fact of adultery; secondly, she is an accomplice in the act of adultery, and how far an accomplice in an act of adultery is to be treated

Considerations applicable to the evidence of a single witness, a *particeps criminis*.

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like an accomplice in an act of felony, is a question worthy of consideration ; thirdly, she has been abandoned by Mr. Simmons, and it is naturally to be supposed that her evidence would be given under a sense of considerable irritation, if not of revenge. Now I wish to keep these considerations as distinct as I can, though it is attended with some difficulty to do so.

With respect to the admission of a single witness to prove an act of adultery in these Courts, the case of *Evans v. Evans** has distinctly prescribed the rule which I, as Judge of the Consistory Court, am bound to follow. I am bound to follow the decision of the Dean of the Arches, whatever it be, and however much I may regret (as I do) that there should be any difference in rules of evidence between Ecclesiastical Courts and those of the Common law. It is a fearful discrepancy, in my opinion, that a man might be executed on evidence which would not be sufficient in law to prove a charge of adultery, even by way of defence. That case of *Evans v. Evans* was decided by Sir Herbert Jenner Fust on the 21st November, 1844, after great deliberation, and after a careful consideration of all the previous authorities. The marginal note is : "The proof of adultery, in a suit for divorce, depending upon the evidence of one witness alone, held to be insufficient to entitle the promoter to his prayer." That was a cause of divorce by Mr. Evans against his wife for adultery, in which only one witness was produced to prove the adultery between the alleged paramour and the wife ; the evidence was held to be insufficient, and Sir Herbert Jenner Fust, having gone through the case, and stated that there had been a verdict in favour of the husband, and damages to the extent of £500 had been recovered, held that the verdict was not evidence in the nature of corroborative evidence, which raises a very nice question, what is corroborative evidence ?

Before I proceed to this question, I will advert to the facts in the present case. It appears that Lucy Peacock had acted in the capacity of bar-maid to Mr. Simmons, when he

* 1 Robert, 165. 3 Notes of Ca. 416.

known public-house in the Haymarket; that he cohabited with her for a considerable period of time, and that he supported, or contributed to support, both before and after his marriage, a child he had had by her. All these are admitted and undoubted facts, and one consideration will be, whether they are facts legally corroborative of the direct evidence as to adultery.

With respect to Lucy Peacock herself, she must be considered as an accomplice, and all the legal considerations applicable to such a witness in these Courts must apply to her. To this I must add, that she has been taken into the service of the son of Mrs. Simmons: a circumstance which must, and always does, excite the jealous vigilance of any Court. All Courts must distrust the evidence of a witness who has been taken (if I may use the expression) into the custody of the party who is about to produce her as a witness: it is impossible not to give way to an inference of her having been tampered with, or unduly biased. On the other hand, I must observe that there is no impeachment of her general character, and the last person living entitled to impeach that character, on the ground of her connection with Mr. Simmons, is Mr. Simmons himself. To this I should add, that I see no objection to the manner in which she has given her evidence. I perceive nothing in that evidence savouring of a disposition, from disappointment or revenge, to state that which is not true. I certainly think her evidence is as fair and impartial as that of any witness in this or any other case.

I think that the question, therefore, resolves itself into this—not whether I believe this witness or not; but whether the evidence is legally sufficient, which are two different things. It may be that the whole of what the witness states is true, and I may not be at liberty to act upon it, as sufficient for the purpose, consistently with the case of *Boas v. Evans*; so that there is a wide distinction between believing the evidence and determining whether that evidence is legally sufficient.

Now, whether it be legally sufficient or not, will depend upon this: whether it be corroborated by other evidence.

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All the authorities go to this ; that the evidence of a single witness corroborated by other evidence is sufficient. Sir Herbert Jenner Fust so stated in *Evans v. Evans*, and it has been so laid down by his predecessors before him. I must abide by the rule that one witness alone is not sufficient to establish adultery, and more especially where (as in this case) that witness is an accomplice, and in the service *de facto* of the person producing her.

What is corroborative evidence.

Now before looking at the corroborative evidence, if such it be, I must address myself to a preliminary question of great difficulty, namely, where there is only one witness to the fact, what is corroborative evidence?—a question which has never been closely considered in these Courts, to my knowledge at least, and respecting which I know not that any of my predecessors have laid down any rules. The case of *Kenrick v. Kenrick** is the only one which, according to my recollection, turned on a question somewhat similar. I doubt whether in that case the question was considered either by myself (sitting in this chair) or Sir John Nicholl (who affirmed my judgment) with that close attention which it may be necessary now to apply to it. The precise point was not raised in that case, namely, what is corroborative evidence? In *Kenrick v. Kenrick*, Sir John Nicholl said : “ The only question is, whether the recrimination is proved ; and if the witness, N., be believed, there can be no doubt about it. She is a single witness ; but if circumstances support her testimony, it is sufficient. There need not be two witnesses ; one witness, and circumstances in corroboration, are all that the law in these cases requires.”

Now I apprehend there is a great difference between evidence of probability and evidence corroborative of a fact. I am sorry to have to discuss such nice points, as I am aware of their delicacy and intricacy ; but I will not shrink from it. I proceed to a case in which a decision was given upon the point, in a testamentary cause, that of *Theakston v. Marson*,† in which the result of all the cases is stated by Sir John Nicholl, and where I find a remarkable expres-

* 4 Hagg. E. R. 114.

† 4 Hagg. E. R. 314.

sion: "By the general law of these Courts, one witness does not make full proof; not that two witnesses are required to each particular fact, nor to every part of a transaction; for it often happens that, to the contents of a will, or to instructions, there is only one witness, the confidential solicitor, or the drawer; but there are and must be adminicular circumstances to the transaction,—such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions,—some extrinsic circumstances, in short, shewing that a testamentary act was in progress, and tending to corroborate the act itself." Now I am not quite certain whether Sir John Nicholl intended his expression to admit the strictness of construction which may be put upon the words "tending to corroborate the act itself;" because, in the case of a will, a previous declaration, although shewing a general probability and an *animus testandi*, must be connected with the instrument, to be evidence of the execution of such particular instrument.

According to the best opinion I can form upon this subject, evidence proving the probability of any transaction, but not going to the transaction or act itself, is not corroborative evidence, in the sense in which I must now use that term. I have endeavoured, so far as I can, to discover whether any help can be derived from analogy with decisions in Courts of Common Law; but the decisions in Courts of Common Law cannot furnish an exact analogy, for this reason, that, except in cases of Treason, which depends upon a particular Act of Parliament (the Statute of William, modified by the 39 & 40 Geo. 3, c. 93), there is no necessity for two witnesses to a transaction; one witness is sufficient in the Courts of Common Law. The nearest analogy is found in the case of accomplices, and the law seems to be that, even in that case, it is unnecessary to corroborate by facts (except in cases of Treason) the sole and unsupported evidence of an accomplice. But, in the present practice, the Judge is accustomed to say that the evidence of the accomplice must be corroborated by other facts. Then the

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question arises, as to what facts: whether general probability will do, or whether the facts must be immediately applicable to the transaction itself? Mr. Philipps, in his *Law of Evidence*,* says:—

In the case of *Rex v. Addis*,† an accomplice, who was the principal witness, was corroborated as to collateral facts, none of which tended to connect the prisoner with the accomplice, or with the transaction: Mr. Justice Patteson observed, that the corroboration ought to be as to some fact or facts, the truth or falsehood of which would go to prove or disprove the offence charged against the prisoner. And in a later case, on an indictment against two persons, Mr. Baron Alderson pointed out the distinction between confirmation as to the circumstances of the felony, and confirmation affecting the individuals charged: the former only proves that the accomplice was present at the commission of the offence; the latter shews that the prisoner was connected with it.‡ In summing up, the Judge observed, that confirmation merely as to the circumstances of the felony was really no confirmation at all.

So that the result has been, that, although the law would be satisfied with a conviction founded upon the evidence of an accomplice alone, in practice, the Judge so far modifies the law, that he advises the Jury to acquit where the accomplice is not corroborated as to facts which implicate the prisoner.

Now where there is no rule as to the number of witnesses requisite, evidence as to probability may have great weight, and be justly considered in forming a conclusion; but if two witnesses are required by law, either together to one overt act, or separately to two overt acts, I conceive that evidence to mere probability, not applying to the act itself, and which evidence may be true or false without affecting the act, cannot be received as corroborative. This is the best solution I can give. I think so, for this reason; that, unless this distinction be adhered to, the rule of two witnesses must vanish into thin air, for there scarcely ever was a case in

* 1 Vol. p. 36. Ninth Ed. (1843).

† 6 Car. & P. 386.

‡ *Rex v. Wilkes*, 7 Car. & P. 272. See also *Rex v. Webb*, 6 Car. & P. 595.

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which some circumstance, in some degree tending to prove probability, might not be established by evidence.

It is upon this principle that I conceive that the fact of Mr. Simmons having cohabited with Lucy Peacock, prior to his marriage, is not in law corroborative of the evidence of Lucy Peacock to a connection afterwards. Certainly, the existence of a former connection renders a renewal more probable than the commencement of an entirely new connection; but the existence of the former connection is a totally separate fact, and may be perfectly true without affording any proof of a connection afterwards.

For these reasons, I conceive that I must examine this case with a view of discovering whether there be any evidence, legally corroborative of Lucy Peacock's, of another kind,—that is, evidence not merely shewing that her account is probable, but proving some facts *ejusdem generis* with her evidence, and tending to produce the same result, namely, the commission of adultery at a certain time and place.

The Additional Articles plead that Mr. Simmons renewed this connection soon after his marriage; that he supplied Lucy Peacock with money for herself and child; that the connection took place at her father's house, 44, Union Place, Lambeth Walk, and at other places, and that they met by appointment. Lucy Peacock, the daughter, deposes to a renewal of the intercourse in February, 1843, at 36, Paradise Row, and again in June, 1843, at the same place, and once in the interval at the *Sydney Smith*. She also speaks to the allowance made for the child; to application to the parish, and to the letter as to Mr. Simmons's going to Hambro. It is true that there is a confusion about Paradise Row and Union Place; but I do not consider that error in pleading,—for it is no more,—of any importance. There is also a contradiction as to the date of the meeting between her and Mr. Simmons at the *Sydney Smith*; but this is a trivial circumstance.

Now let us see whether she is corroborated by her mother, Lucy Peacock. She says that, up to November, 1844, Mr. Simmons was in the habit of coming occasionally to her

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house to see her daughter and pay for the child. I must observe that, for several years before, as well as after, the marriage,—namely, from 1839, when, according to her daughter, they ceased to live together,—that was the habit of Mr. Simmons. She says that, in the early part of 1843, Mr. Simmons saw her daughter, and they were alone together for some time; and she repeats her evidence as to this occurrence several times in the course of the examination.

There is no other evidence applicable to this part of the case except the letters. With regard to the letter to Mr. Peacock, stating that Mr. Simmons was about to proceed to Hambro, I do not see how it can operate on the case. There is no doubt about the provision for the child; and take it that Mr. Simmons wished to get rid of the burthen, that will not prove adultery. But there are letters addressed to Mr. Simmons himself, and really from them I can draw no conclusion at all. They are not begging letters,—that is not the proper expression to apply to them,—they are letters requesting assistance from Mr. Simmons to maintain the child, which he was bound to maintain, and to assist the daughter, who had been abandoned by him. They prove a breaking off of the connection, but they neither prove nor disprove the alleged connection in 1843. As to the letters written by Mr. Simmons himself, the last bears date in 1840, two years before the marriage, with the exception of the letter annexed to the Additional Articles. I do not see that they have any other effect than to corroborate Lucy Peacock as to the connection at the time; but that did not require corroboration; it is not a disputed fact, and is not the question in the cause.

Then I come back to the real difficulty of the case. I assume that a decree for separation on account of adultery cannot pass on the evidence of Lucy Peacock alone. Is she corroborated, in the legal sense of the term? The only evidence of that nature, even if it be so, is that of the mother, who speaks to Mr. Simmons's being alone with Lucy Peacock on one occasion, in 1843. At what hour, dark or light, in what room, bed-room or not, whether the door was locked, or the room was accessible to any person who came,—as to

these points, I regret to say, there is not one single tittle of evidence in the cause. Nay, the fact of the meeting, and their being alone together, may be perfectly true, because it was consistent with Mr. Simmons's habit of coming and paying for the child, both before the marriage and after; and yet there might be no criminal connection. Not a word is said as to familiarities taken, clothes or bed being disordered, or any thing of that kind.

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Is this, then, sufficient evidence in law to support the testimony of a single witness to the fact, that witness an accomplice in the offence, at least as to illicit connection, though, perhaps, not of adultery,—a witness, too, living in the service, in effect, of the party producing her, and naturally irritated, to a certain extent, or her mind influenced, by the abandonment of herself and child, though I admit that her evidence is fairly given? The evidence of the single witness not corroborated.

I feel constrained to come to the conclusion that such evidence is not sufficient in law, and I truly say "constrained," for, if left free from all legal restrictions, I should not be inclined to discredit Lucy Peacock; and looking at all the circumstances of this case, it would have been a much more acceptable duty to have pronounced for the separation than against it. Unquestionably, Mr. Simmons has no claim to the favourable consideration of the Court; but he is entitled to legal justice. That, to the best of my ability, I must administer, and never permit a regard to the comfort and happiness of any individual to interfere with the due course of law.

I am of opinion that neither cruelty nor adultery is legally proved, and therefore I must decree, according to the prayer of Mr. Simmons, that this lady do return to cohabitation. The Court was asked so to decree with costs. Most certainly I shall not give costs, for two reasons: first, when I look at the whole complexion of the case, it is not one of a favourable character; secondly, when I consider the means used to procure the evidence of Mrs. Bish, who has been so improperly dealt with by Mr. Simmons,—upon this point alone, I should not give costs. And I repeat now, what I have said before, that I never will give costs to any party Decree according to prayer of the husband. Costs.

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Simmons.*

where I find that a witness, when he comes to be examined, is liable to have his evidence compared with previously written statements, so that the witness goes before the Examiner fettered by declarations made out of Court. Therefore, I do not give costs.

Proctors:—*Lockner*, for the husband; *Bayford*, for the wife.

High Court of Admiralty.

2nd Sess.

APRIL 27.

Wages of master (a co-mortgagee of the ship), subject to a settlement of accounts with the mortgagee in possession, the original owner being bankrupt. — **Objection to the Registrar's Report.** **THE "REPULSE."**—*Act on Petition.*—This was originally a suit for subtraction of wages, instituted by Mr. Thomas Marquis, late master of the *Repulse*, against the ship, under the Stat. 7 & 8 Vict. c. 112. The original owner of the ship, Mr. James Tomlin (of the firm of Tomlin and Man), in May, 1842, mortgaged her, with power of sale, to Mr. Henry Shuttleworth, to secure £5,000, advanced by him to Messrs. T. and M. Capt. Marquis, who was appointed to the command of the ship, destined upon a voyage to India, entered into an arrangement with Mr. Shuttleworth, whereby he (Capt. M.) agreed to advance £1,500 upon the mortgage, giving Mr. Shuttleworth a Power to act for him in his absence, and an order to sell certain teas belonging to him, and apply the balance of the proceeds (after paying certain sums) towards meeting the sum of £1,500, such balance being ultimately the only sum advanced by him. The vessel sailed on the 15th May, 1842; and on the 13th June, Messrs. Tomlin and Man became bankrupt. The vessel returned home, after a very disastrous voyage, in January, 1845, when Mr. Shuttleworth, who had made further payments on account of the ship, under the mortgage-deed, took possession of her, and sold her for £6,100 to Mr. William Phillipp Beech to break up.

The ship having been arrested at the suit of Capt. Marquis, a Proctor appeared for Mr. Beech, the present owner, who objected to Capt. Marquis's right to sue; but the Court rejected his petition.* The Proctor then appeared also for Mr. Henry Shuttleworth, and, on behalf of him and of Mr. Beech, admitted the wages to be due, subject to what was owing by Capt. Marquis upon a settlement of accounts; and the Court referred the amount of the wages, together with all accounts and vouchers, to the Registrar and Merchants.

APRIL 27.

Repleas.

1845.

June 24.

The Registrar having brought in the Report, finding a Dec. 13. Balance of £852. 3s. 10d. due to Capt. Marquis, the Proctor for Mr. Shuttleworth objected thereto, on the ground that the Registrar and Merchants had not admitted any consideration of the accounts between Capt. Marquis and Mr. Shuttleworth, as co-mortgagees of the ship, but had confined their report to the consideration of the claim of Capt. Marquis upon the ship, contrary to the spirit and meaning of the Decree of Reference; alleging that the sale of the ship to Mr. Beech was made for the mutual benefit and with the full knowledge of both mortgagees, and that Mr. Shuttleworth was bound to indemnify Mr. Beech from loss, and therefore was entitled to have all accounts between him and Capt. Marquis relating to the ship investigated and reported upon. On behalf of Capt. Marquis, the Report was also objected to, on the ground that various items had been unduly disallowed or deducted from his claims,—viz. £117, on account of his forty tons of privilege freight (as by agreement with the original owner), £144 commission on freight (also by agreement), and £220 travelling expenses.

Haggard and R. Phillimore, Drs., for Mr. Shuttleworth.— The Report of the Registrar and Merchants is erroneous. The "fair settlement of accounts," directed by the Court, on the former occasion,† has not been made. Captain Marquis would go away with money of Capt. Shuttleworth in his pocket (£852) to resist his claims in the Court of Chancery.

1846.

May 23.

ARGUMENT.

* 4 Notes of Ca. 166, q. v.

† 4 Notes of Ca. 172.

APRIL 27.

Repulse.

Addams, Dr., for Capt. Marquis.—We are damaged by the Report. The Court, having all the facts before it, might correct the Report without further reference.

July 28.

JUDGMENT.

DR. LUSHINGTON.—In this case, an Act on Petition has been entered into in objection to the Registrar and Merchants' Report, which is objected to by both parties, and it is now for the Court to determine whether the objections on one side and the other are tenable, and whether I am to affirm the Report as it stands, or refer it back to the Registrar and Merchants to be reconsidered, in relation to Capt. Shuttleworth, and in reference to the balance to be paid to Capt. Marquis.

I will consider the case of Capt. Shuttleworth in the first instance, and that is a case of precedent and practice, and amounts to neither more nor less than a question whether certain specific items ought or ought not to be allowed. The Registrar and Merchants, in considering the reference made to them, have thought it right to confine their Report to such matters as occurred between Capt. Marquis and Capt. Shuttleworth, not dealing with the questions between Capt. Marquis and the original owner of the vessel.

Now it is necessary to consider the peculiar circumstances under which this case came before the Court,—for most peculiar those circumstances were. Suppose the case had stood thus: the original owner was Mr. Tomlin, and he became bankrupt at a very early part of the transaction. If the ship had remained in the original hands, I apprehend, had she been arrested at the instance of Capt. Marquis, and the assignees of Mr. Tomlin had appeared and given bail, under the Statute,* Capt. Marquis, as master, might have claimed a right to proceed against the vessel itself, and I should be bound, if advances had been made to Capt. Marquis, to have referred his demands to the Registrar and Merchants to report on. But I should have had no hesitation in telling the Registrar and Merchants that whatever Capt. Marquis had received, and whatever was due from

* 7 & 8 Vict. c. 112.

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Regulus.

him on account of the ship, during the voyage, ought to be taken into the account; otherwise I should be acting in a manner repugnant to the soundest principles of justice. I can hardly conceive any thing more unjust than that I should enforce a claim against the owner of the vessel, and, to recover an equally good demand on his part, connected with the same transactions, compel him to have recourse to a suit in equity or at law. The ordinary practice is, where a mariner sues a ship for wages, that whatever has been advanced on account of his family whilst he is absent, or to himself, is always taken into account. In the present case, Capt. Shuttleworth was mortgagee of the vessel in possession; in fact he was owner of the vessel, the original owner having been bankrupt during the time of the various transactions between Capt. Marquis and Capt. Shuttleworth. The vessel came to this country and was sold by Capt. Shuttleworth to Mr. Beech (he having a power of sale), and after it was sold to Mr. Beech, the vessel was arrested here, and consequently it came before me in June, 1845, and I had not any doubt in my own mind that Capt. Shuttleworth had a right to appear in the case. Mr. Beech, though owner of the vessel by purchase from Shuttleworth, had nothing whatever to do with any of the antecedent transactions, and if a Decree had gone against the vessel itself, Shuttleworth, as vendor of the vessel, must have made good to Beech the expenses he had been at. I admitted Capt. Shuttleworth to be a party in this Court, without regard to any Act of Parliament at all, upon the universal principle, because his interest was at stake, and to that principle I adhere. The Registrar and Merchants, in looking at the transactions, seem to have entertained a doubt as to the extent of the jurisdiction of this Court; and I agree with them, that difficulties might have occurred. I was not unaware of those difficulties, but I was fully determined to encounter them, otherwise I could not do justice at all. The Registrar and Merchants may, with good reason, perhaps, apprehend that I am going too far upon this occasion. I am going to this length: to refer back the Report to the Registrar and Merchants for further consideration of the

APRIL 27.

Repulse.

accounts between Shuttleworth and Marquis as to the transactions of the ship on that voyage. It would be useless for me to attempt to discuss the particular items; but I wish the Registrar and Merchants to take into account every thing which in law or equity would be due and owing to Capt. Marquis on account of the wages he claims, and every thing due and owing from Capt. Marquis to Capt. Shuttleworth on account of the transactions of the ship during this voyage. If this was not done, I should leave a remnant for a Court of Equity to deal with, and it would have been much better not to have proceeded at all. My object is to settle all the accounts between the parties relative to all the transactions, and whichever way the balance is, it ought to be paid. The Registrar and Merchants will reconsider the question, so that I may decide upon the objections to the items. I think it better that I should not pronounce any judgment as to the items now, but refer back the Report generally. If the Report comes back as it is, I must determine how far the objections as to the items are well founded; but I wish the Registrar and Merchants to reconsider these items.

Report re-
ferred back.

Oct. 19.

The Registrar brought in a further Report, stating that there was due from Capt. Marquis to Mr. Shuttleworth on the settlement of all the transactions and accounts £654. 4s. 1d., according to the following schedule:—

	£.	s.	d.
Account of disbursements of Mr. Shuttleworth, mortgagee in possession, acting as owner, including his advance of £5,000 on mortgage of the vessel; premiums of insurance, commissions, outfit, wages, interest on his advances, &c., as agreed upon with the owners, under a deed of mortgage, dated 4th May, 1842	11,773	3	9
Further account of disbursements as per account of T. Haviside and Co., brokers of the ship	331	15	5
Account of wages, privileges, commissions, and disbursements, due to Capt. Marquis by former Report, now again adopted on reconsideration ..	852	3	10
	12,957	3	0

Amount received by Mr. Shuttleworth, net proceeds of sale of ship to Mr. Beech .. 6,039 0 0
 Amount paid thereout to Messrs. Gladstones and Co. for pilotage, wages, cargo, and a bottomry-bond .. 3,000 0 0

3,039 0 0

Received by him from Messrs. T. W. P. and Co. for balance of light account, &c. .. 1,632 8 9
 Charge in interest account, commission and interest being disallowed .. 113 1 4
 Received by Mr. Shuttleworth for re-insurance of premiums of insurance .. 267 3 8

5,051 13 9

Loss on mortgage £7,905 9 3

Article of an undertaking contained in a letter, dated 5th May, 1842, addressed to Mr. Shuttleworth by Capt. Marquis, he undertakes to provide Mr. Shuttleworth with funds to the extent of £500 for his share of the mortgage, and to bear proportionate share of loss (if any) that may arise from such mortgage: the loss above stated is therefore divided as follows, viz.:-

Mr. Shuttleworth's share on	£3,500	5,533 16 9
Capt. Marquis's share on	1,500	2,371 12 6
	£5,000	7,905 9 3

Amount due to Mr. Shuttleworth by Capt. Marquis, his proportion of loss on mortgage, as before stated .. 2,371 12 6

Amount received by Mr. Shuttleworth from Parker and Sons, arising from the sale of tea belonging to Capt. Marquis, sold by his authority and for his account .. 1,875 4 2
 Amount paid by him to Capt. Marquis and others for his account also 1,128 2 9

747 1 5

Interest allowed as agreed upon .. 118 3 2

865 4 7

Expenses, &c. due to Capt. M., as per former Report now adopted .. 852 3 10
 1,717 8 5

Amount due to Mr. Shuttleworth by Capt. Marquis .. 654 4 1

April 27.

Replies.

APRIL 27.

Replies.

This further Report was objected to by Capt. Marquis (with reference to the division of the loss arising from the mortgage), on the grounds that, under the deed of mortgage, there were secured to Mr. Shuttleworth, as the mortgagee, interest at $7\frac{1}{2}$ per cent. on the £5,000; $2\frac{1}{2}$ per cent. commission on the ship's earnings (charged by him on £19,500); and $\frac{1}{2}$ per cent. commission for effecting insurances (charged by him on £48,000); that, by Capt. Marquis's letter to Mr. Shuttleworth, he requested him to apply the balance of the proceeds of the sale of his teas towards making up the £1,500, on the understanding that he (Marquis) was to receive 10 per cent. per annum by way of interest on the said balance, in consideration of his thereby undertaking to bear his proportionate share of loss (if any) that might arise from such mortgage; that Mr. Shuttleworth retained the balance of the proceeds of the sale of the teas (namely, £804. 10s. 5d.) towards making up the £1,500, and no other sum was advanced by Capt. Marquis to Mr. Shuttleworth in respect of the £1,500; that in the account of "disbursements" of Mr. Shuttleworth is included £2,000, which was lent by him on his own account to Tomlin, the former owner, and to which advance Capt. Marquis was no party; that, in November, 1842, Mr. Shuttleworth became, and thenceforward acted as, owner of the ship, subsequent whereto the losses referred to in the Report were sustained, in the expenditure and management of the ship, and not from the mortgage, so that he (Capt. Marquis), if liable to any share of the losses, is only so in the proportion of £804. 10s. 5d., the sum actually advanced by him to Mr. Shuttleworth. On behalf of Mr. Shuttleworth, it was alleged, in Reply, that all the matters set forth in objection to the Report are matters of account arising out of the mortgage, and the trading with and navigating the ship, and had been fully considered by the Registrar and Merchants; that Capt. Marquis, besides the 10 per cent. interest on the balance in the hands of Mr. Shuttleworth, received other advantages, to wit, his appointment (through the instrumentality of Mr. Shuttleworth) to command the ship, to which various emoluments were incident, according to

agreement, which were an equivalent for those set forth as accruing to Mr. Shuttleworth ; that the teas left by Capt. Marquis to be sold by Mr. Shuttleworth produced £1,875. 4s. 2d., but the drafts of Capt. Marquis and other claims upon the proceeds reduced the balance to £804. 10s. 5d. ; that the £2,000 referred to as advanced by Mr. Shuttleworth to Tomlin, was a payment made by him on account of wages and necessities supplied to the ship, to enable her to proceed to sea, and was a transaction growing out of the mortgage, and to the advantage of Capt. Marquis ; that in November, 1842, Capt. Marquis was still a co-mortgagee of the ship, and that the losses arose out of the whole transaction of the mortgage, and were in a great measure occasioned by the unnecessary expenditure and other mismanagement of Capt. Marquis.

APRIL 27.

Repulse.

Addams, Dr., for Capt. Marquis.—It is not denied that any fair balance should go in diminution of Capt. Marquis's claim ; but he is responsible for no more than the sum he actually advanced ; he has nothing to do with the £2,000 ; and, whatever losses were incurred, in consequence of the trading of the ship abroad, which was for the benefit of Capt. Shuttleworth (who became owner upon the bankruptcy of Tomlin and Man), must not be brought into account against Capt. Marquis.

1847.

Feb. 25.

ARGUMENT.

Haggard and R. Phillimore, Drs., contrâ.—The question is, whether there is sufficient legal evidence that the contract of Capt. Marquis was to extend to £1,500, or only to the amount of the balance of the proceeds of the tea ; what, under the circumstances of the agreement, was to be Capt. Marquis's proportion of the loss, if any ? We contend that Capt. Marquis undertook to advance, not the balance of the teas, but £1,500, and under the contract he was liable to that proportion of the loss, as joint mortgagee.

PER CURIAM.—I must take time to consider this case.

DR. LUSHINGTON.—I cannot satisfactorily dispose of this case without briefly recapitulating the facts whence the litigation has arisen, and stating the proceedings which have been had ; but I shall do so only so far as I think is abso-

April 27.
JUDGMENT.

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Repulse.

lutely necessary to bring out clearly the questions which remain to be decided.

The suit is brought by Capt. Marquis, who had been the commander of the *Repulse*, for his wages earned on board that ship, and this proceeding is had under the 16th section of 7 & 8 Vict. c. 112. The Court has already decided* that, notwithstanding all previous transactions, and the sale of the ship especially, Capt. Marquis was entitled to maintain such suit, and also that Capt. Shuttleworth, who was the mortgagee in possession, and sold the ship, had a right to appear in this Court for the purpose of seeing that the amount of wages was properly ascertained, and of substantiating any counter demands which could with justice, and according to law, be set off against the claim for wages, Capt. Shuttleworth being in effect the owner of the ship, and whatever should be paid to Capt. Marquis on account of wages coming out of the property and pocket of Capt. Shuttleworth.

The cause proceeded on this footing. A reference was made to the Registrar and Merchants, who made a Report accordingly; that Report was objected to on both sides, and came under the consideration of the Court on the 28th July, 1846. It was referred back for further consideration on the objections taken by both parties. A second Report was made, which is objected to by Capt. Marquis only, and I have to determine whether the objections are well founded, or, in other words, whether, in my judgment, the account is well taken.

This is a general view of the case; but I must now necessarily descend to particulars. The first Report found a balance of £852. 3s. 10d. to be due to Capt. Marquis. The second Report found a balance of £654. 4s. 1d. to be due to Mr. Shuttleworth. The difference between the two Reports arose from this—that, in the first Report, the mortgage and any loss therefrom were wholly excluded. In the second Report they were included. In all other respects, the Registrar and Merchants adhered to their original Report.

* 4 Notes of Ca. 166.

This account, therefore, by the second Report, stood thus—
that a balance was due to Mr. Shuttleworth of £654. 4s. 1d.
The Proctor for Mr. Shuttleworth prays that this Report be
Confirmed, and the Proctor for Capt. Marquis objects to the
mode in which the mortgage account has been taken, and
also repeats his objections to the deduction of various items
Of small importance.

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Before I decide the first question, I must observe upon
the agreement entered into between Capt. Marquis and Mr.
 Shuttleworth. Such agreement is the whole foundation of
 Mr. Shuttleworth's demand. It is admitted that some agree-
 ment was entered into, and the Court must inquire how that
 agreement was constituted, then the effect and true con-
 struction of it, and, lastly, if the mode adopted by the
 Registrar and Merchants of taking the accounts be conform-
 able to the agreement, and also consistent with law and
 practice.

Construction
of the agree-
ment.

I must, to make the statement intelligible, shortly advert
 to the state of circumstances which led to the agreement.
 It appears that this vessel was the property of Messrs.
 Tomlin and Man, and that, prior to 1842, it was mortgaged
 for a large sum of money; that Mr. Shuttleworth undertook
 to pay off the existing mortgage, and to advance other
 moneys; but, for the precise effect of this engagement, I
 must look, not to what is alleged or sworn, but to the mort-
 gage-deed itself, which is the sole legal evidence of the
 obligations of the parties under it. It was also agreed be-
 tween Mr. Shuttleworth and Messrs. Tomlin and Man,
 though not by deed, that Capt. Marquis should be ap-
 pointed to the command of this vessel, then destined on a
 voyage to the East Indies. How far this was or was not a
 valuable appointment appears to me to be of no importance
 to the decision of the questions under consideration. The
 value of the appointment, be it more or less, cannot affect
 or alter the arrangements either of Mr. Shuttleworth with
 Messrs. Tomlin and Man, or the arrangement made be-
 tween Mr. Shuttleworth and Capt. Marquis.

The next question is, whether Capt. Marquis, to any and
 what extent, became a party to this deed of mortgage. By

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the term "party," I of course do not mean a party to the deed itself, because he was not so, but was he bound by an engagement to take a share in it—to have a share of the advantages and bear a part of the losses? This transaction is between Mr. Shuttleworth and Capt. Marquis only. The agreement, if there be any legal agreement, is constituted by the two letters to which I shall presently refer. I cannot entertain any reasonable doubt that this is a valid agreement; indeed, I must say this is an admitted point on both sides, and the only question debated and argued by the learned Counsel was as to the interpretation and construction of the agreement.

The first letter is dated the 5th May, 1842; it is written by Capt. Marquis to Mr. Shuttleworth, and it is as follows:—

London, 5 May, 1842.

Dear Sir,

Having left with you my Power of Attorney to act for me in my absence, and also an order to sell my teas, I have to request, after paying the sums before mentioned, you will apply the balance towards meeting the sum of £1,500, that being the amount I was to advance on the mortgage of the ship *Repulse*, as agreed between us; and, to prevent any mistake, it is understood I am to receive 10 per cent. per annum, by way of interest on the said balance, in consideration of my hereby undertaking to bear my proportionate share of loss (if any) that may arise from such mortgage. I am, Dear Sir, yours truly,

Thos. Marquis.

To Mr. Henry Shuttleworth.

Now the effect of the letter I take to be this: first, that Capt. Marquis had agreed to advance the sum of £1,500 on the mortgage of the ship, the deed of which is produced in these proceedings; secondly, that Mr. Shuttleworth was to sell some teas belonging to Capt. Marquis, and, after paying certain sums (not in that letter mentioned), apply the balance towards meeting the sum of £1,500; thirdly, that 10 per cent. was to be the interest on the balance; fourthly, that this interest was to be paid in consideration of Capt. Marquis bearing his proportionate share of the loss, if any, which might arise from such mortgage.

Upon the meaning of this letter, I will at present only observe, that I apprehend that, by the proposition contained in it, the mortgage is clearly identified, and that Capt. Marquis must be bound by the provisions of the mortgage-deed, so far as his share extends, whatever these provisions may be. I postpone all observations as to the meaning of the word "proportionate," on which the chief difficulty arises, until I have considered the second letter; for the agreement is not contained in one letter, but in the two letters taken together.

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The second letter is dated 10th May, 1842, and is written by Mr. Shuttleworth to Capt. Marquis. I apprehend it is quite clear that this second letter was intended to be an answer to that of the 5th May, and was also intended by Mr. Shuttleworth to express in a more detailed form the agreement he purported to enter into with Capt. Marquis. The letter, however, does refer to some particulars not specifically mentioned in the former letter of May 5th, from Capt. Marquis, as the specification of the teas, and as to payment to Capt. Macqueen of £671, with interest; and it contains (for it is not necessary to read the whole) these words:—"The net proceeds of the tea, after deducting for the payment of all such orders as you may give upon me, is to go towards the £1,500, as your share in the mortgage of the ship *Repulse*, it being understood that whatever balance remains of yours in my hands, after payment of the above sums, is to be considered as invested in that mortgage." Then follow the words:—"You taking part in the risk or loss, should any occur, in consideration of which, you are to receive interest at 10 per cent. per annum for all sums (not exceeding the £1,500) of money as may remain in my hands, after payment of the before-mentioned orders."

Now the question, whether Capt. Marquis's share of the loss shall be computed upon £1,500, or upon the sum he actually advanced, may depend, in the first instance, and must depend, upon the meaning of these two letters. Is it not clear that there was a direct agreement to advance £1,500? I do not apprehend that any person who reads the two letters carefully over could come to a different con-

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clusion. Suppose nothing had been said as to the teas, and suppose no money paid by Capt. Marquis, and consequently that he had not fulfilled the agreement at all, and suppose a loss had then occurred upon the mortgage, I apprehend that the total non-fulfilment of the agreement could not have exonerated him from bearing his share of the loss; and though that share would be estimated with some reference to the proportion that £1,500 bears to the whole mortgage, how it would be estimated, or at what precise amount, is by no means so clear.

I am aware that, in certain respects, a different view, but not, I think, essentially different, has been taken of these letters, and no doubt it is possible to contend that, although £1,500 was the sum named, yet that it was stated only to negative a right to advance more, and that payment was to be derived from the balance of the teas only, and the interest of 10 per cent. and risk were to be confined to the amount of such balance. That was the argument of the learned Counsel for Capt. Marquis. Now it may be well to consider the consequences of both constructions. In the first case, if there be a positive agreement to advance £1,500, Mr. Shuttleworth would be entitled to demand and have payment of that money, and that Capt. Marquis should bear a loss in some way (I do not say in what) in the proportion that £1,500 bears to the whole mortgage; and Capt. Marquis could not divest himself of this responsibility by not paying what he had undertaken to pay. In the second case, the agreement would in effect be of a totally different nature; it would not be an agreement to advance £1,500 at all, but to advance so much of the balance of the teas, more or less, not exceeding £1,500, and to bear the loss in the proportion that the sum paid bore to the whole mortgage. I confess I cannot extract this meaning from the letters. I think there is an absolute stipulation to advance £1,500, though, very probably, the expectation of the parties, but not the expressed agreement, was, that the balance arising from the teas should be the only fund for payment, that being supposed at the time to be an adequate fund.

There is another way of construing the two letters, namely,

That the agreement was to advance £1,500, but that the loss should be only in proportion to the sum advanced, as interest at 10 per cent. should only be paid on the sum actually advanced. But this in effect would be only to put the former proposition in another shape, and to say that there was no stipulation to advance a sum of £1,500 at all. In fact, such a construction would annihilate the stipulation for the advance of £1,500, and would, I must think, violate the express terms of the letters themselves; and if I find, as I believe I do, one clear stipulation, I must, I conceive, in a case of doubt, construe the doubtful part so as not to destroy what is clear. It is to be observed that both letters speak of the balance arising from the sale of the teas being "applied towards meeting the sum of £1,500"—these are the very words of the first letter. The second letter does not differ from the other: "is to go towards the £1,500," are the terms used in the second letter. Had the parties intended that the balance should be the whole sum invested, provided it did not exceed £1,500, they ought to have said so; but they have not: *quod voluere non dixere*. I am well aware that it is very difficult to put with confidence precise meanings on agreements so loosely worded; but if parties will so negligently conduct their own affairs as to leave such matters in doubt, they must submit to the consequences; and I regret to observe the extreme, and I may say extraordinary, carelessness with which both parties express themselves. In the one letter it is called "proportionate share of loss:" proportionate to what? In the other letter, "part in the risk or loss," without the slightest specification as to what is meant in the first letter by "proportionate share," or in the other by "part in the risk or loss."

I agree with the Registrar and Merchants, and am very clearly of opinion, that the letters do contain an agreement to advance £1,500, and that agreement has been violated by the advance of a less sum of money; but I think it does not, therefore, follow that, in an account between Capt. Marquis and Mr. Shuttleworth, I can confirm the Report, computing the loss in the proportion that £1,500 bears to £5,000, and not as £804. 10s. 5d. (the sum actually ad-

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vanced) bears to £5,000 ; and for the reasons I am about to state. I apprehend that the question of what loss Mr. Shuttleworth has sustained by the breach of the agreement is not matter of account at all, but a question of unliquidated damages, which cannot be made matter of account, and the amount of which a Jury alone can ascertain. For though it is true a Jury, in estimating the damages, may adopt the Report of the Registrar and Merchants (they may or may not), I have no power to do so, and I am not aware that the Court of Chancery has the power to estimate itself unliquidated damages.

I feel myself, therefore, compelled to come to the conclusion, that in this respect I must alter the Report, not because I differ from the Registrar and Merchants in the construction they have put upon the letters, but because I am of opinion that the amount of the loss must be computed, as unliquidated damages, by another tribunal. For these reasons, I consider that the Report must be altered, and I direct that the loss be taken on the sum of £804. 10s. 5d., in the proportion that sum bears to £5,000, and not as £1,500 bears to £5,000.

Items ob-
jected to.

The next point of the case is, whether the £2,000 advanced by Mr. Shuttleworth to pay for the provisions of the ship is to be considered as a payment made under the mortgage-deed. I will first observe that from the letters it appears that the mortgage-deed of the 4th May (for the letters refer to it) was the mortgage-deed referred to, and I am of opinion that, whatever may be the contents of that deed, both parties are bound thereby. It may be that neither party *de facto* read the deed, or was cognizant of its contents ; but having referred to it in letters constituting an agreement, it must be binding upon them. That deed provides for the advance of any sum of money, not exceeding £10,000, and amongst other purposes specially points out advances to be made by Mr. Shuttleworth for the provisions, stores, and outfit of the ship. Now it is not denied that £2,000 was advanced for such purpose, and therefore I think must be considered as advanced on account of the mortgage, and a loss incidental to it and under it.

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These considerations alone, independent of all others, would lead my mind to, and justify, the conclusion to which I have come. But the letter of May 10th puts the matter out of all question, for it proves not only that Capt. Marquis, through the medium of that letter alone (as well as in other ways), knew that this £2,000 was to form a payment under the mortgage, but that it was to be paid out of the joint proceeds. I do not advert to the affidavits, but to the agreement itself: "You will understand that the first sum of money you may receive on the ship's account is to be remitted to me, it being the agreement between myself and Capt. Tomlin, that £2,000, with the amount of insurances, &c., shall be paid off as early as possible, and only the sum of £5,000 remain on mortgage, that being the extent originally agreed upon: the mortgage extends to the freight, as well as on the ship." Now it is quite clear that Capt. Marquis entered into this part of the agreement with his eyes open, and was aware that Mr. Shuttleworth had advanced this £2,000 under the mortgage, and that it was to be paid up in the first instance; and if not, the loss was incidental to the mortgage and covered by the mortgage, and no doubt Capt. Marquis assented to this letter: so that he has not, either in law or equity, the slightest claim to be exonerated from bearing a share in this loss of the £2,000. I, therefore, adhere to the Report of the Registrar and Merchants with respect to this item.

I now proceed to dispose of what I may call three sets of items objected to, and the solution of the questions which arise upon those items mainly depends upon the agreement entered into between Messrs. Tomlin and Man and Capt. Marquis, on the 2nd May, as to his having the command of the vessel, and that agreement, where it is particular, must govern the claims of Capt. Marquis against the ship for his privilege and emoluments. Of course Capt. Marquis cannot be entitled, as against Mr. Shuttleworth, in this matter, to any more consideration than against Messrs. Tomlin and Man, if they had remained solvent. Now the Registrar and Merchants have disallowed a charge made by Capt. Marquis, on what is called his privilege account, of

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£117. 10s. 2d., from Bombay to China, which they consider an overcharge. I understand the facts to be these. Capt. Marquis did not himself, for the purpose of carrying on a private adventure, employ any part of the privilege tonnage allowed by the agreement, but the whole tonnage was appropriated to the ship's account. The agreement as to the privilege tonnage is this: "Forty tons of privilege freight, free all round, and in case of the ship being chartered by Government or otherwise, the same rate per ton to be allowed to Capt. Marquis for his tonnage as may be paid by the charterers, or a sum equal to that which it would have produced had he retained it." That is, there was to be allowed to the master so much room on board the ship for the purpose of loading his own cargo, in any private adventure in which he might think fit to engage; and if he did not think fit to avail himself of any of it, and the tonnage went to the account of the ship, he should be at liberty to claim a certain sum of money in proportion. I apprehend the proportion to be this:—the proportion which forty tons bore to the whole tonnage of the ship, whatever it might be. These are the words: "Forty tons of privilege freight, free all round, and in case of the ship being chartered by Government or otherwise, the same rate per ton to be allowed to Capt. Marquis for his tonnage as may be paid by the charterers, or a sum equal to that which it would have produced had he retained it." These are not very clear expressions; but the meaning I understand to be this: If you do not avail yourself of your privilege, and the whole of it is employed on the account of the ship, you are to be paid such a sum of money as the proportion of forty tons bears to the whole tonnage of the ship. In the present case, the tonnage of the ship was 1,600 tons, and, according to this principle, the claim of Capt. Marquis would be according to the proportion which 40 bears to 1,600. The Registrar and Merchants have reported that Capt. Marquis is entitled only to a proportionate part of the freight, according to the terms of the letter; whereas, Capt. Marquis contends, as I understand, that he is entitled to be paid not in proportion to the whole freight, but in propor-

tion to a part which bears a higher rate. There may possibly be some ambiguity in this part of the agreement; but, without evidence that any injustice has been wrought to Capt. Marquis by the Report, I cannot overrule it. I am not satisfied that it is founded upon an erroneous principle; on the contrary, I think that the true meaning is, that the two expressions are synonymous.

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The next item is a sum of £114. 2s., commission charged on freight from Calcutta to England, which is claimed under the following passage in the agreement between Capt. Marquis and Mr. Tomlin: "And should the ship return direct from India, Capt. Marquis to be allowed 2½ per cent. commission on freight."

Now the vessel sailed originally from a port in England, and did not return direct to England, but circuitously, going to China. The claim of Capt. Marquis could arise only in the event of the vessel's returning direct to England, and it is an admitted fact that there was an intermediate voyage. It is wholly impossible, therefore, to admit this charge, and I adhere without hesitation to the Report of the Registrar and Merchants, who have disallowed it.

There is one more objection. The Registrar and Merchants have disallowed £220, and allowed £181. 17s. 6d., under the head of "Travelling expenses at the Cape on bottomry, and expenses on shore in India, China, &c." These expenses, I apprehend, cannot be governed by any thing I find in the agreement, saving so far as the following words can be considered as applicable: "Capt. Marquis to be allowed his customary expenses in port;" in other words, he is to be allowed his customary expenses; but as to what those customary expenses are, the agreement is utterly silent. I have no evidence before me that the Report is erroneous, or that the charges have not been properly disallowed. I cannot enter into the items charged by Capt. Marquis and disallowed by the Registrar and Merchants; but I must say that the allowances appear to be made on a most liberal scale, and I have no hesitation in pronouncing against this objection made by Capt. Marquis.

The result then is this: in one respect, and in one only Final result.

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(though that is a very important one), I must alter the Report. In all other respects, I confirm it. I shall not refer it back, not wishing to put the parties to more delay and expense. I shall alter the Report in the following manner. It appears the loss, according to the Second Report, amounts to £7,905. 9s. 3d. I conceive this loss must be borne in the following way: Mr. Shuttleworth must bear his loss in the proportion that £4,195. 9s. 7d. bears to the whole amount of £5,000, and Capt. Marquis must bear his loss as £804. 10s. 5d., the amount he actually advanced, bears to the £5,000. The consequence will be, that Mr. Shuttleworth's loss will be £6,633. 9s. 7d., and Capt. Marquis's £1,271. 19s. 8d. But to make it clear, I will shew how the account stands.

The Report states that there was due to Capt. Marquis for wages, &c., £852. 3s. 10d. Then he advanced the amount of the balance of the sale of the teas, which, with interest at ten per cent. (which he was entitled to under the agreement), amounts to £865. 4s. 7d.; making together £1,717. 8s. 5d. From this must be deducted his loss, in the proportion which £804 bears to £4,195, or £1,271. 19s. 8d., and the result will be, that there is due to Capt. Marquis £445. 8s. 9d.

Costs.

I now come to the question of costs, and, looking at the proceedings which have been had in this case, I am anxious to find some legal principle upon which I could dispose of the question of costs in so complicated a case. The general principle is, that whoever succeeds shall receive his costs from the other party. Costs are not given in the shape of a penalty, as a matter of punishment, but as an indemnification to the party who succeeds in the suit,—because he is right and the other in error, and the party who has sustained wrong ought not to be subjected to expense in seeking a remedy. That is the true principle upon which costs are given. But here the parties are sometimes right and sometimes wrong, and if I were to deal with the costs upon the general principle, I might do injustice. Therefore, I ought to apportion the costs of the different hearings according to the principle I have laid down, namely, the

principle of success, as far as it is applicable to the circumstances.

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At the first hearing of the case, Mr. Shuttleworth objected to Capt. Marquis being entitled to sue the ship on account of his wages. I was of opinion that Mr. Shuttleworth was wrong, and pronounced against the validity of that objection, and the costs of the first hearing I am of opinion Mr. Shuttleworth must pay. At the second hearing, the first Report was objected to by both parties. Mr. Shuttleworth objected to this Report that the accounts between himself and Capt. Marquis, as co-mortgagees of the ship, had been left out of consideration, and Capt. Marquis objected to the omission of certain items; I thought that Mr. Shuttleworth was right and Capt. Marquis wrong; and, therefore, I give Mr. Shuttleworth the costs of that hearing. With regard to the present decision, upon the second Report, it is substantially in favour of Capt. Marquis, and I think that he is entitled to the costs of this hearing.

One matter still remains. Capt. Marquis, in all ordinary circumstances, would be entitled to pay at the hands of the Court a Monition (as bail has been given) for the payment of the amount of money which I have pronounced due to him under the accounts. But I must not lose sight of the fact, that an action may be brought upon the breach of the agreement for unliquidated damages, because I think Mr. Shuttleworth right in substance, though wrong in form. Being so, I shall adopt the course pursued by my predecessor, Lord Stowell, in a case similar not in circumstances, but in principle, and I shall not allow the Monition to issue for one month, giving Mr. Shuttleworth that time to decide whether he will bring his action, and if he does not at the end of one month, I shall grant the Monition. [*The Proctor for Mr. Shuttleworth.*—Mr. Shuttleworth is in India: it is quite impossible to communicate with him in that time.] I cannot give longer time; there would be no end to the case.

Proctors:—Coote, for Capt. Marquis; Glennie, for Mr. Shuttleworth.

3rd Sess.

MAY 6.

Collision.— **THE "GEORGE."**—*Cause, by Act on Petition.*—This was a vessel, A, on the star-board tack, with the wind three points free, at night, descried another vessel, B, ahead, close-hauled, on the larboard tack, approaching, but so far to windward that, believing if B kept her course they would have gone clear, she did not give way (whereas B ported her helm), and the vessels came in collision:—Held that A was in fault and B did right.

a cause of damage by collision promoted by the owners of the schooner *Globe* against the *George*. The accident occurred about half-past six o'clock, P.M., on the 18th of December, 1846. The *Globe* had left Stockton-on-Tees that day, coal-laden, bound for Topsham, and when off the Whitby Light, discerned the *George*, in ballast, from Shoreham to Hartlepool, on her leeward bow, according to her account, distant a quarter of a mile. The wind was W.S.W., three points free for the *Globe*, which was on the starboard, the *George* on the larboard tack. The master of the *Globe*, considering that the vessels would go free, kept his course, but, soon discovering that the *George* was coming stem on, he altered the helm a-weather; before it could take effect, the collision occurred, and the *Globe* was cut nearly through. On the part of the *George* it was alleged that, when she first descried the *Globe*, the vessels were approaching each other stem on, and, being on the larboard tack, she obeyed the Trinity Rule, and ported her helm.

The Court was assisted by Trinity Masters.*

Addams and *Twiss*, Drs., for the *Globe*; *Sir J. Dodson*, Q.A., and *Bayford*, Dr., for the *George*.

SUMMING UP. **DR. LUSHINGTON** (*addressing the Trinity Masters*).—It is necessary that I should request your opinion upon two distinct points. With regard to the facts of the case, it appears to me that there are not many matters upon which the evidence really differs. The questions of fact upon which there is discordant evidence are, first, whether the vessels were approaching stem on, or the *George* was considerably to the windward of the *Globe*; secondly, what was the description of the night—whether very dark and hazy, or of an ordinary kind; thirdly, in what manner the two vessels actually came into contact. How far these questions may be of importance in guiding your opinion to enable us

* Captain Hayman and Captain Farquharson.

come to a right conclusion on the case, will be for discussion presently.

MAY 6.

George.

There are some very important facts admitted on all sides, and I will first call your attention to what is stated in half of the *Globe*, and with a view of at once putting to rest these questions,—whether, if all be true which the *lobe* states, she conducted herself according to the proper rules of navigation. According to the statement of the *lobe*, she was proceeding from Stockton-on-Tees to Topnam, pursuing her course S. E. by S., with the wind S. W., three points free. She was on the starboard tack, and saw a light from the vessel approaching her, three points upon the lee bow. She states that, at that time, the distance between the two vessels was a quarter of a mile. What being the state of the facts, what did she do, according to her own statement? Nothing. The first question which arises with respect to the conduct of the *Globe* is, having seen the vessel approaching, whether, having the wind three points free, she ought not to have given way, and thus avoided the chance of collision? The answer on the part of the *Globe* is this: “We kept our course because we saw that the other vessel was so far to windward of us, that if such vessel had kept her course, we should have gone at least 100 fathoms free.” That might bring us to this consideration—one that has often occurred in this Court—namely, when two vessels are approaching each other at night, when it is almost impossible to decide with absolute certainty, if they keep their respective courses, whether a collision will take place or not, is it not the duty of a vessel to take every possible precaution to avoid a collision, and not to trust to the mere chance, that, if they keep their respective courses, they will go clear? The first question will be, whether the *Globe*, seeing a vessel approaching, ought not to have ported her helm and given way. But there is another circumstance. The master says, being satisfied that the two vessels would pass, he directed his attention to the vessel ahead. You will consider whether that was a prudent mode of acting, when he saw the vessel was

Case of the
Globe.

MAY 6. approaching. He then finds the *George* is approaching, and what does he do? He puts his helm hard-a-weather.

George.

The first question I shall have to ask you is, whether you think that, in the two particulars to which I have called your attention,—doing nothing in the first instance, and then putting the helm hard-a-weather,—he was right. You will recollect that they were a quarter of a mile distant, and no more, when the vessels were approaching.

Defence.

Now, let us consider the defence on the part of the *George*. She was close-hauled on the larboard tack: I wish to call your attention particularly to this. It is said that, being on this tack, she ought to have kept her course, and the other vessel, steering S.E. by S., having the wind free, ought to have got out of the way. That is the way it is put by the Counsel for the *George*. Now, I take it to be quite true, that where a vessel has the wind free, and another not free, on whatever tacks the vessels are, the one that has the wind free ought to give way, and the vessel with the wind not free ought to keep her course. But when you laid down such a Rule as that, it had reference to different circumstances from those now before us. When two vessels are approaching each other—I do not care on which tack they may be—the one that has the wind free ought to give way, and the other ought not to alter her course to avoid danger on either side. That was the case that occurred the other day.* Nothing, I repeat, would be more mischievous than for a vessel, which ought to keep her course, to suppose that the other vessel would not do her duty, and therefore alter her course. This would lead to all sorts of mischief. But the question in the present case is, whether, when two vessels are meeting at night, and it is impossible to ascertain whether the other vessel is close-hauled or not, the vessel on the larboard tack, close-hauled, ought not to port her helm, as well as the vessel on the starboard tack: being dark, the Trinity Rules do not apply, inasmuch as it would be impossible so distinctly to make out a vessel's course as

* *The "Test,"* ante, p. 276.

could be done in broad daylight. That is a difficult question for decision.

MAY 6.

George.

Now the facts are, the *George*, in ballast, discovered the *Globe*, a laden vessel, in the first instance, and she immediately hoisted a light, after which she went on to do various acts with which you are best acquainted. The question I have to put to you is this: are you of opinion that the *Globe* was to blame, or that the *George* was to blame? I have said nothing about the weather, because it appears to me that it is not necessary to discuss either that question or the precise mode of contact.

CAPTAIN HAYMAN: My brother and myself are decidedly of opinion that the *Globe* was wrong. The *Globe*, seeing the vessel ahead, or nearly so, even if she had only two points of the wind free, ought to have put her helm a-port. The master of the *George* acted right. He kept a vigilant and good look-out, and directly he observed the *Globe* ahead, he squared his yards and kept away before the wind.

OPINION.

PER CURIAM.—I dismiss this action with costs.

JUDGMENT.

Proctors:—*F. Clarkson*, for the *Globe*; *Coots*, for the *George*.

THE "STADACONA."—*Cause, by Act on Petition.*—In this case, likewise a case of collision, the *Isabella*, laden with lead and cork, from Portugal, bound to London, was coming up the Channel, when, about two o'clock in the morning of 31st March, nine leagues S.W. of the Lizard, she came in collision with the *Stadacona*, an Austrian vessel, in ballast, coming down channel, bound from London to Limerick. According to the *Isabella*, the wind was S.S.E., her course E., and she was on the starboard tack, one point free, going two knots an hour. On the part of the *Stadacona*, the wind was represented to have been S.S.W.; and she was stated to have been close-hauled on the larboard tack.

Collision. — A vessel, bound by the rules of navigation to port her helm, not doing so in sufficient time, held responsible for the damage caused by the consequent collision.

The Court was assisted by the same Trinity Masters.

Haggard and Jenner, Drs., for the *Isabella*; *Addams and Bayford*, Drs., for the Austrian vessel.

MAY 6.
Stadacona.
 SUMMING UP.

DR. LUSHINGTON (*addressing the Trinity Masters*).—Gentlemen: It appears to me that, though reference has been made, in the course of the Argument, to the case decided this morning, there is not the slightest resemblance between the two cases in any respect whatever. In the former case, all the material facts were agreed to, and the question was, what was the proper course which ought to have been pursued, according to the rules of good seamanship? In the present case, one of the most material facts—the quarter from which the wind blew—is directly in contest, and the evidence is contradictory, there being affidavits on both sides. You will have to make up your minds, first, as to whether it is necessary to decide from what quarter the wind did blow; and, secondly, what was done by both vessels. Let me briefly state the facts.

The facts.

According to the *Isabella*, she was laden with lead and cork, coming up the Channel, on the starboard tack, the wind being S.S.E., and the course E., going two knots an hour, with the wind one point free. The *Stadacona* was coming down, on the larboard tack, and the *Isabella*, as soon as she discovered her, shewed a light a-head: she did nothing else, but kept her course, according to her statement, and was struck on the starboard bow. The first point for your consideration will be—supposing the circumstances true—whether she was right in keeping her course. She certainly did right in shewing a light.

On the part of the *Stadacona*, the first and most important difference between the two statements is as to the wind. On the part of the *Stadacona* it is stated to have blown from the S.S.W.; on the part of the *Isabella* from the S.S.E., being a difference of several points. The *Stadacona* states that she was an empty ship, proceeding to Limerick to take emigrants on board—that she was close-hauled, on the larboard tack. I looked to see what course she was steering, and I do not find that there is any direct averment. Whether it is important or not we will hereafter decide. This is the statement generally: that at midnight, on the 30th, the wind blew strong from the S., varying from S. to S.S.W., whereupon the vessel was

steered a course to the W. under topsails, courses, and topgallant sails; that, the night being hazy, a careful watch was kept on deck; that, shortly after one o'clock on the 31st, the ship's jib was set, at which time no vessel whatever was in sight. At half-past one o'clock, the *Stadacona*, being about nine leagues to the S. and W. of the Lizard, was still steering in the same course as on the preceding night, hauled by the wind on the larboard tack: it must have been so, but there is no precise statement in words of the course she was steering. According to her statement, she observed the *Isabella* one point on the larboard bow. She then ported her helm, and called to the *Isabella* to do so, but she kept closer to the wind, and the collision took place.

MAY 6.

Stadacona.

If it were indispensable to decide from which quarter the wind blew, we must consider how the evidence stands. There is a protest made on behalf of the *Isabella*, which states that the wind was S.S.E., and two affidavits, together with one from Lieut. Paynter. It was urged by Counsel, as an objection to his evidence, that he was distant about forty or fifty miles from the place of collision. In considering that objection, you will take into account whether the fact accords with the statement of the *Isabella*. From the two statements together you will form your opinion whether the evidence given by Lieut. Paynter will have a material bearing on the case. With respect to the evidence on the other side, there is the affidavit of the master and mate of the *Stadacona*, and there is also other evidence, to which I wish particularly to direct your attention—that of four volunteers. This is an Austrian vessel, and three of those who make affidavits are also Austrians, and one a Norwegian. They state that the wind was as represented by the *Stadacona*. You will consider what is the credit due to these statements; but I beg leave to add that your attention undoubtedly should be drawn to the Log produced from on board the *Isabella*. It would have been no evidence in the case if produced on behalf of the *Isabella*, but having been produced on behalf of the *Stadacona*, it is then evidence which the *Isabella* may refer to, if necessary.

MAY 6.
—
Stadacona.

One part of the statement I will read: "Strong winds and hazy; many vessels in sight. At 3 P.M. tacked ship to southward. At 4 P.M. double-reefed the mainsail and top-sails, and reefed the trysail and foresail; Lizard Point bore E.N.E., distant five miles. Midnight, moderate breeze and clear weather; tacked ship to eastward." Before that, the ship, I presume, had her head to the W., and, I presume, that she should have had her head to the E. as she was going up Channel, on a wind which was S.S.E., and she would not have had her head to the W. if she could have avoided it. "At one A.M. saw a ship ahead; immediately shewed the light, and found she did not answer it, and, seeing her nearing of us fast, hailed the ship, and she answered us. We did our best endeavours to avoid her, but to no purpose." Then the accident takes place. You will consider whether any light is thrown on the difficulty of the case by having before you the manœuvres pursued by this vessel antecedently—whether you will get any clue as to what was the real state of the wind at this time.

It has been said that the *Stadacona* ought to have ported, and she did port her helm. That is true enough, but did she port it in time? which is a different question. No doubt she ported it when she saw the collision approaching; but if you adopt a measure at an improper time, it does not take away the culpability of not having done it before, and preventing the accident. I ask you, whether you are of opinion that the *Isabella* was to blame in this case?

OPINION.

CAPTAIN HAYMAN.—We think that the wind was S.S.E. The *Isabella* did all she could, under the circumstances. She was close-hauled on the wind, and the master never altered his course. The other ship was coming free. Though she put the helm up, did she do it in time? We say no; therefore she is to blame.

JUDGMENT.

PER CURIAM.—I pronounce for the damage and costs.

Proctors:—*Jenner*, for the *Isabella*; *Rothery*, for the *Stadacona*.

Prerogative Court of Canterbury.

MAY 7.

3rd Sess.

AYRES v. AYRES.—*Allegation.*—This was a business of proving the will of William Ayres, who died 10th April, 1846, leaving Martha Ayres, his widow, and John Ayres, his only child. The personal estate of which he died possessed consisted only of £20 Long Annuities (value about £200), and furniture worth about £80. He was also possessed of a freehold cottage and premises, which were mortgaged for two-thirds of their value. The paper in question bore date in August, 1844, and was in the form and to the effect following:—

I William Ayres of thorpe green in the parish of thorpe, in the county of Surrey being in a sound state of mind and health for which I return God thanks—

I do hereby with my last will and testament bequest to Martha Ayres my lawfull wife the sum of twenty pound pr. annum in the long annuities for her own sole use my freehold house garden beds and all other buildings thereto belonging to be sold to pay all my Just debts, and my body to be decently interred *after* [erased with a pen] then I give and bequeath to my *four nephews, that is to say, John Benwell, the lawfull son of my sister Ann and William Benwell, also John Applegate* [these words in italics erased with a pen, and the words "the sum of twenty pound" interlined] and George William Applegate the son of my sister Sarah and John Applegate, of Adam St. West, Portman Square *also Charles Jolly, son of my sister and brother Richard Jolly, of Red Lion Street, Red Lion Square, Holborn, London* [these words in italics erased with a pen.] my household furniture I give to my wife with the exception of the articles hereafter named, one silver spoon, which was my aunt King's, wick I give to my sister Elizabeth Conington, also a small time piece which was from my father's watch, the bed and bedding beurow drawer table and chairs now in the front room, with a set of blue and gold china, the bread and butter plates and all thereto belonging I give to Frances Thatcher daughter of my wife Martha Ayres all money that may be haded after this to the Long annuities will be for my wife and at her disposal.—I give to my son John Ayres one shil-

A holograph will of 1844, the dispositive part and the appointment of executors filling the first side or page of the paper, and the *testimonium* clause and signatures of the deceased and of the attesting witnesses being written on the middle of the reverse or back page, the residue not being specifically disposed of (exhibiting on the face of it unattested alterations, respecting which no information could be given):—Held not to be signed at the foot or end.

MAY 7. ling I give to my two executors twenty pound each for their
 Ayres v. Ayres. trouble the money ["be" interlined] at free of duty and any other
 expense I hereby Name Mr. Joseph Kent grocer of Staines
 ["Middx" interlined] for one and Mr. William Kent bricklayer
 of Staines for the other

[Here ends the first side or page, without any point: on the
 back, or reverse page, half-way down, the upper part being blank
 are the following words:]

the last will and testament of William Ayres of Thorpe in the
 county of Surrey signed this the *Nineteenth* [erased with a pen
 and over it is written "Twentyeth Six"] August in the year of our
 Lord one thousand eight hundred and forty four Signed and
 Sealed this the twentyeth ["Sixth" interlined] of August 1844.

William Ayres

Witness { George Halford
 George Brown
 James Watts

The two surviving subscribed witnesses (James Watt
 having died in February, 1845), in their affidavit, state
 that, in or about the month of August, 1844, but the time
 more particularly they were unable to recollect, they
 attested the execution of the will; but they could not de-
 pose generally to its plight and condition at that time, or
 whether the alterations now appearing were made therein
 previous to the execution, by reason that, save as to the
 testator's signature, they took no notice whatever of the
 paper.

1846.
 Nov. 6.

The executors having renounced, and there being no
 residuary legatee named, application was made to the Court
 on behalf of the widow, for administration with the will
 annexed, which the Court declined to grant upon Motion.
 The paper was accordingly propounded by the widow, in
 an Allegation, pleading that the deceased drew up the will
 with his own hand, and on the 20th August, 1844, signed
 his name at the foot or end, in the presence of three wit-
 nesses, present at the same time, who attested and sub-
 scribed the same in his presence, in manner and form as
 appeared thereon; that the deceased, after such execution
 with his own hand, made the alterations now appearing on
 the face of the paper; that no evidence could be obtained

tending to shew when they were so made; and that, shortly after the death of the deceased, the will was discovered by one of the executors in a locked writing-desk wherein the deceased was accustomed to deposit papers of moment and concern.

MAY 7.

Ayres v. Ayres.

The admission of this Allegation was opposed on behalf of the son, John Ayres.

Robinson, Dr., in opposition to the Allegation. — The Paper set up in this Allegation is invalid upon the face of it. The residue of the property is not disposed of, which distinguishes this case from others where the Court has allowed probate to pass on Motion. The case of *Hudson v. Parker** defines the rule to be adopted in interpreting the 9th section of the Act relating to the execution of wills, and it is impossible, consistently with that rule, or with the letter of the Act, to hold that the signature of the deceased, in the middle of the second side (there being ample space at the bottom of the first side for the *testimonium*-clause and the signature), is at the foot or even at the end of the will, and that the witnesses attested a will which they had no means of seeing; whereas they are to see not the mere signature, but the will itself: *non constat* that the paper might not have been blank on the other side. The object of the Act is to prevent unattested additions being made to a will after execution. The Allegation pleads no evidence by which the objection to the paper can be removed, and the Court will not, by admitting it, open a door to similar experiments.

1847.

May 7.
ARGUMENT.

R. Phillimore, Dr., in support of the Allegation. — If the doctrine be, that the witnesses must see the will as well as the signature, this instrument is undoubtedly invalid; but it has been decided that this is not necessary; that it is sufficient if the witnesses see the signature of the testator. In *Hudson v. Parker*, and in *Doe d. Jackson v. Jackson*,† the deceased covered his signature. The Legislature has not guarded against the possibility of a testator shewing the witnesses his signature and afterwards writing the whole

* 3 Notes of Ca. 236. 1 Robert. 14.

† 1 Notes of Ca. 575, n.

MAY 7.
Ayres v. Ayres.

will on a blank sheet of paper, which (unless destroyed by extrinsic evidence) would be a good will. No inference arises upon the face of this will, or from circumstances, that the testator contemplated making any addition to the disposition. [PER CURIAM.—How does it appear that the whole property is disposed of? The freehold might sell for more than would pay the debts.] If so (which I do not admit), it would not follow that the testator did not believe he had disposed of all his property. He has named no residuary legatee, but he has appointed executors, with which the first page ends. It is no uncommon thing for a large blank to be left in a will. I should say that there was not room for the *testimonium*-clause and attestation at the bottom of the first page. [PER CURIAM.—I doubt whether there is room for the clause, and the signatures of the deceased and the three witnesses.] In *Carver's Case*,* there was a larger space left in the will in which an addition might be made. In *Re Scarlett*,† where the Court rejected the Motion, the deceased purposely left blanks for additions to the will, and a considerable addition had been made after the execution. Alterations are not in the same category with additions; they may be excluded without impairing the validity of the will. *Cooper v. Bockett*.‡ Some of the alterations here,—the interlineation of “the sum of twenty pound,” for example,—must have been made before the execution. [PER CURIAM.—When was it executed? Some day in August, the witnesses will say.] We have nothing to guide us but the will itself.

JUDGMENT.

SIR H. JENNER FUST.—The paper in question is stated to be in the deceased's own handwriting, and to have been found in his possession at his death in the plight and condition in which it now appears. Upon the face of the paper, it is certainly not signed at the foot or end of the will; *prima facie*, it is not duly executed, though the Court has, in some cases, done more in granting probate of such papers than it was, perhaps, quite warranted in doing, having, in the early

* 1 Notes of Ca. 276. 3 Curt. 29.

† 4 Notes of Ca. 480.

‡ 4 Notes of Ca. 685.

construction of the Statute, decreed probate of papers which had been signed in places different from the place where the signature is usually expected to be found. The Court has gone to the utmost length in those cases ; but in those papers there was no reason to suppose that the deceased intended to make an addition, because the residue was specifically disposed of. Whether it is disposed of in this case may depend on circumstances, and no residuary legatee is named. The only words that could be so construed, would be the addition to the Long Annuities ; unless there was an addition to them, it would not go to the wife. There might be a contingent residue, arising from the freehold house, from the proceeds of which the debts are to be paid. As the paper stands, the deceased might have added any thing he thought proper, at any time, between the execution of the will and the day of his death.

MAY 7.

Ayres v. Ayres.

The Allegation propounds the paper for probate, not in the form in which it now appears, but in which it is suggested it was originally executed, though the witnesses cannot give any information upon this point, for they saw nothing but the signing of the paper. There is nothing from which the Court can conjecture the time at which the alterations were made, whether on the 19th of August—which purports to be the original date—the 20th, or the 26th, which date is added in two places ; and looking at the affidavit of the subscribing witnesses when the Motion was made, I find they cannot say on what day in August it was.

Under these circumstances, it is not a case which comes before the Court under favourable auspices. It is suggested that the words "Twenty pound" must have been added before the execution of the will. But why ? Because without them the will would not read. It may be that the deceased made the alteration between the writing of the paper and the execution ; but there is no evidence of it. All the witnesses know is, that the deceased signed his name on the second side of the sheet, there being a blank half left before the *testimonium*-clause. That there is room for his signature at the bottom of the first side, there can be no doubt. The circumstances of this case differ from those in the case of

MAY 7. *Carver.* It is a misfortune that the property, in most of these cases, which the Court is called upon to dispose of upon Motion, is so small as not to bear the expense of propounding the paper, and the Court has been led to put a construction upon the Act which, in all probability, if there had been an appeal, the Judicial Committee of the Privy Council would not have done. I have reason to know that it is the opinion of the Superior Court that this Court has gone to the full length in giving effect to the intentions of parties; I am not, therefore, inclined to go further in the construction of the Act. It was the impression on the mind of the Court, that, when the Act of Parliament required that the will should be signed "at the foot or end thereof," it was with a view to obviate a construction which had been put upon the Statute of Frauds, that the name of the deceased, written at the commencement, "This is the will of me, so and so," was a sufficient signature to satisfy that Statute. But there are other reasons that suggest themselves, and have been suggested to the superior Court, namely, the preventing additions being made to a will, after execution, by the deceased, and guarding against the inconveniences that might arise from the whole will being made after the deceased had signed the paper. What is there here to satisfy the Court that the witnesses knew that any thing was on the other side of the will, or that the will was written before the *testimonium*-clause?

The signature not at the foot or end. Upon the face of the paper, therefore, I am of opinion that I cannot hold that this is a signature at the foot or end of the will. The utmost extent I can go is to say that, though it is not signed at the foot or end, yet the signature was written after the will.

Allegation rejected. I see no use in admitting this Allegation to proof; the case would be in precisely the same circumstances. I am of opinion that the Court must reject this Allegation.

June 5.
Costs.

In the ensuing Term, the case came again before the Court on the question of costs. It was moved, on behalf of the widow, that the costs should be paid out of the estate.

The case, it was urged, was *primæ impressionis*, being the first will of this kind which had been propounded. On the other side, it was argued that it would be repugnant to the principles of common justice if the Court decreed the costs out of the estate. The son, a pauper, was called upon to see the will propounded in solemn form; the Court had rejected the Allegation propounding it, thereby virtually pronouncing against the validity of the will, and it had now no jurisdiction over the other party.

MAY 7.
Ayres v. Ayres.

PER CURIAM.—I am clear that, if this Motion had been made at the time the Allegation was rejected, the Court could not have hesitated in decreeing the costs out of the estate. It is too much to say that this case was not one which must be disposed of by a Decree of this Court, and the Court might have had some difficulty, in the early stages of construing the Statute, in saying whether this was or was not a due execution of the will. I am of opinion that this case is not out of the Court, and that the party is not in a worse situation than when the Allegation was rejected by the Court, which must now decree administration, and I shall direct all the expenses to be paid out of the estate.

Out of the
 estate.

Proctors :—*Toller*, for the son ; *Townsend*, for the widow.

END OF EASTER TERM, AND OF THE SITTINGS
 AFTER TERM.

Admission during the Term :—

AS PROCTOR.

May 4.—*ALFRED FENTON, Esq.*

TRINITY TERM, 1847.

Archers Court of Canterbury.

1st Sess.

MAY 22.

Where, in a cause of office, by Letters of Request, a sentence against a Clerk in Holy Orders of suspension *ab officio et a beneficio* was alleged to have been evaded by his refusal to pay to the sequestrator appointed by the Bishop the amount of rent due for the glebe land, which he held as a tenant, and of rent-charge due from him as occupier, the Court refused a Monition calling upon the party to shew cause why he should not be pronounced in contempt, or why he should not pay the demands.—In such a case, it is for the Bishop to en-

THE OFFICE OF THE JUDGE PROMOTED BY TROVE
v. HURST.—*Motion.*—In Easter Term, a Motion was made to this Court* for a Monition calling upon the Rev. John Hurst, Rector of Thakeham, Sussex, who had been, in 1845, suspended for three years from his office and the profits of his Living, to shew cause why he should not be pronounced in contempt for disobedience to the sentence by not delivering possession of the temporalities of the Living to the Sequestrator appointed by the Bishop of Chichester, his diocesan. This motion was refused, on the ground that this Court had no return from the Bishop of Chichester, the Ecclesiastical Sheriff, of his inability to collect or levy the profits of the Living, without which it could not follow up the Monition by signifying the contempt of the party.

A return being now made by the Bishop of Chichester, setting forth that Mr. Hurst continued, at the date of the return (20th April last), in spite of repeated demands, to retain the profits of the Living; on the 4th May, *Haggard and Bayford, Drs.*, renewed their Motion for a Monition against Mr. Hurst to shew cause why he should not be pronounced in contempt for disobedience to the writ issued by the diocesan Court, in furtherance and pursuance of the sentence of this Court.

SIR H. JENNER FURT.—Before I give any opinion, I should like to see the form of the Monition proposed to be served upon Mr. Hurst. Let it stand till the next Court

* *Ante*, p. 160, where the facts are stated.

day ; in the mean time the form may be settled. The case is precisely in the same situation as before, except the return from the Bishop.

MAY 22.

*Trower v.
Hurst.*

The draft Monition was brought in, but

Haggard and *Bayford* submitted that, as the official return had been laid before the Court shewing that its Decree had not been complied with, the Court was in a situation to call upon the party to shew cause why he had not done what was necessary to the carrying out of the Decree. Whatever powers other Courts may have, the power of this Court of enforcing its own Decrees is not taken away. This course will avoid the difficulties which beset every other, and it is in conformity with a principle of law acknowledged by all. The Court is asked to call upon this person to shew cause why he has not done what he ought to have done, the omission being shewn to be an evasion of the Decree of the Court.

force, or endeavour to enforce, payment by his own Court and officers.

MAY 22.

SIR H. JENNER FUST.—Upon the last occasion, when a **JUDGMENT** Motion was made to pronounce the party in contempt for not having paid the rent of the glebe-land, and the sum due for rent-charge, it struck the Court that there would be very great difficulty in drawing up a Monition to carry the object into effect, namely, to pronounce the party in contempt for not paying the rent-charge and the rent of the glebe-land, and the Court said it should like to see the form in which the Monition was to be drawn up. The draft Monition is now before the Court, but the Motion is a different one, namely, for a Monition to shew cause why the party should not pay these sums.

Now, in the first place, the Court is not satisfied that it has the power of enforcing such a decree: it must be satisfied that, if the party refuses to appear, it could follow up the Monition by a Decree to pay the money, and I am not satisfied that I am in a condition to enforce the payment at the present moment. If I were satisfied that the Bishop of Chichester's Court had no power to enforce payment, that would be a different thing ; but I am not satisfied of that.

MAY 22.

*Trower v.
Hurst.*

Why he cannot follow up the Sequestration I am not informed. The party is called upon to pay not only the rent of the glebe-land, but the rent-charge upon land in his own possession. The possession of the glebe-land having been demanded by the Sequestrator, at the suggestion of Mr. Hurst, he was suffered to remain in possession of that land, —accepted as a tenant,—at a rent fixed by a surveyor. The rent, therefore, is owing from him not *qua* rector, but *qua* tenant. I do not apprehend that any Ecclesiastical Court has power to enforce the delivering up of the land; all it can do is to levy the profits of the land; and with regard to the rent-charge, that must be recovered in the same way as every other rent-charge. I cannot understand how the Court can enforce payment not to its own officer, but to the officer of the Bishop of Chichester, to whom the bond is given. It would be only where the Court was satisfied that there was no other remedy that it would go out of its way, especially in a case where the party has been suffered to remain in possession of the land, under a verbal agreement, as tenant of the Sequestrator. I confess I should be exceedingly unwilling to grant a Monition to shew cause unless I were convinced in my own mind that the Decree could be enforced. I am not prepared to take upon myself this *onus* unless driven to it by necessity, and unless I were satisfied that the Bishop of Chichester could not enforce payment by his own Court and officers. For what purpose was the Sequestration issued? To take care that the duties of the office were performed during the time Mr. Hurst was suspended, and to see that the surplus profits, if any, were expended for the purposes of the Living. I have endeavoured to discover some course by which I could enforce payment of this money; but how can I issue a Monition to shew cause why these sums of money should not be paid for rent-charge on land which Mr. Hurst holds as an occupier, or for rent of the glebe-land which is due from him as tenant, not as Rector? Mr. Hurst does not withhold the money from the Court, but from the Sequestrator.

Monition re-
fused.

I am of opinion that I am not in a situation to decree this Monition to issue; and I must, therefore, reject the

Motion. It shews the unfortunate situation the party is placed in.

MAY 22.

Bayford, Proctor.

Trower v.
Hurst.

BOODE v. BOODE.—*Motion*.—This was a suit for a divorce by reason of adultery by the husband against the wife, brought by Letters of Request from the Court of Salisbury. An application was now made, on behalf of the husband, to be allowed to examine *de bene esse* the clergyman who solemnized the marriage of the parties, to prove that fact, he being upon the point of going abroad, and it being uncertain when he would return. The marriage took place in 1834, and the other persons present at it were dead.

Practice.—A party, alleged to be a necessary witness, about to leave the country, not allowed to be examined *de bene esse*, without an affidavit.

Sir J. Dodson, Q.A., in support of the Motion.—We have had no opportunity of getting an affidavit. We addressed a letter to the gentleman proposed to be examined on the 18th May, at Bath, and the answer arrived on the 21st, and he is about to leave the country on the 24th or 25th. [PER CURIAM.—Is there any case in which a party was allowed to be examined *de bene esse* without an affidavit?] No; but it is in aid of justice, since, if this party be not now examined, his evidence may be lost. [PER CURIAM.—It is the principle. Are there no means of proving the marriage by any other evidence?] It is so stated.

ARGUMENT.

SIR H. JENNER FUST.—I cannot depart from the rules of the Court. It does not appear to me to be absolutely necessary to examine this gentleman. At all events, I must have an affidavit. If an affidavit is brought in, and it shews a legal necessity, the party may be examined *de bene esse*, subject to all objections at the hearing of the cause.

JUDGMENT.

Motion refused.

(Sentence of separation was pronounced.)

June 29.

P. Fenton, Proctor.

Prerogative Court of Canterbury.

1st Sess.

MAY 27.

An appointment of executors, written vertically in the margin of a will, excluded from the probate.

IN THE GOODS OF RICHARD TOOKEY, DEC. — *Motion, ex-parte.*—The testator died 9th November, 1846, leaving a will bearing date 3rd January, 1845, executed in the presence of three attesting witnesses, one of whom was the writer of the will. The signature of the testator was at the end of the dispositive part; then followed the date, the word "witness," and the signatures of the three attesting witnesses. In the margin, written vertically, at right angles with the body of the will, and reaching below the signatures, appeared the following words: "I appoint as my executor my brother-in-law, G. D., and also my wife, M. T., as executrix to this my last will and testament." The drawer of the will and another of the attesting witnesses deposed that the clause in the margin was written prior to, and formed part of the will at the time of, its execution.

MOTION.

Robinson, Dr., moved for probate to the executor and executrix named in the margin. [PER CURIAM.—How do you make the will to be signed at the foot or end?] It is an insertion in the margin, made before execution. [PER CURIAM.—Suppose, instead of in the margin, it had been written below the signature?] That would have been a much greater departure from the strict form. The attesting witnesses saw the passage at the time of the execution. [PER CURIAM.—But they did not see it at the foot or end of the will.]

DECREE.

SIR H. JENNER FUST.—It is quite impossible to grant probate of this clause. It is not quite certain that all the property is disposed of by this will; but be that as it may, there is no signature at the bottom of the clause in the margin. It is quite impossible to grant probate to these persons. I reject the Motion as it stands; but the widow may take administration with the will annexed. I give no opinion as to the effect of the will.

Smale, Proctor.

High Court of Admiralty.

JUNE 3.

2nd Sess.

The "JOHN BUDDLE."—*Cause, by Plea and Proof.*—Collision.—
 This was a cause of damage by collision, brought (in the first instance) by the owners of the schooner *Eliza Ann* against the brig *John Buddle*, the owners of which brought a cross-action against the schooner. The latter, a vessel of 122 tons, with six hands, coal-laden, was proceeding from Seaham to the south; the brig, of 260 tons, in ballast, having eight hands, was bound to the north. The schooner was close-hauled on the starboard tack, lying S.S.E., the wind being S.W. (according to her statement, but according to the *John Buddle* W.S.W.), when, about ten o'clock at night, on the 19th November, 1846, off Flamborough Head, she came in collision with the brig, which was on the larboard tack. The night was dark, and the vessels were in proximity before they descried each other. The schooner kept her course. On the part of the brig, whose duty it was, according to rule, to have given way, by porting her helm, the defence was that, at the time of the collision, she was unmanageable, being then, and having been for twenty minutes before, up in the wind, with her courses shaking, to enable her crew to reef the sails, and as she could not get out of the schooner's way, if either vessel was to blame, it was the *Eliza Ann*, who should have got out of the brig's way, and might have done so if she had kept a good look-out.

The Court was assisted by Trinity Masters.*

Addams and Bayford, Drs., for the Eliza Ann; Haggard and Twiss, Drs., for the John Buddle.

DR. LUSHINGTON (*addressing the Trinity Masters*).—SUMMING UP.
 Gentlemen: It appears to me that this case is one of a very

* Captain Rees and Captain Gordon.

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John Buddle.

simple character, and that its decision depends upon two or three questions of fact. Let us, in the first instance, take those matters respecting which there is no controversy; then let us consider what would be your rule; and, lastly, see what are the circumstances, and whether they form an exception to that rule or not.

The facts.

The wind appears to have been blowing strong, though not a gale: I think it must be taken to be a strong wind, from the very fact of the vessel's reefing her sails. The night was rather dark, but not very dark. The quarter from which the wind blew, perhaps, may not be of much importance, but in the original averment on behalf of the *Eliza Ann*, it is stated to have been S.W., and in the defence, on behalf of the *John Buddle*, W.S.W., two points more to the N. I apprehend that it is of little importance whether the wind was a little more or less free. The *Eliza Ann* was close-hauled on the starboard tack, proceeding to the south; the *John Buddle* on the larboard tack, proceeding to the north, and, according to your ordinary rules, the *Eliza Ann* ought to have kept her course, and not given way. But all rules are framed for the benefit of ships navigating the seas, and, no doubt, circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule, howsoever wisely framed. It is, at the same time, of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances, which are alleged to have rendered such deviation necessary, are most distinctly proved and established; otherwise vessels would always be in doubt and doing wrong. Just prior to the collision, it appears, the *John Buddle* was occupied in reefing her sails, and it is admitted on her behalf that she called on the *Eliza Ann* to put her helm down; that she put her own helm down, and did not attempt to give way, as it would have been her duty to have done, if she had not been reefing her sails. Now, the burden of proof lies on the *John Buddle*, and she must shew why, under existing circumstances, the ordinary course was not pursued. Her answer is this: that she was not in a manage-

able state at the time when the two vessels were closely approaching each other. Now, you have heard a great deal of discussion about what is a manageable and what an unmanageable state. You will consider whether she was so unmanageable that she could not pursue the ordinary rule of giving way. That is not a question which I am competent to decide; it is a point entirely for you to determine, because it is simply a question of nautical skill and knowledge. But it was very ingeniously argued, that she was not in an unmanageable state when the two vessels were in proximity to each other, but that she became so by the order given to the man at the helm to put the helm down, and it is said that rendered her unmanageable. That is a matter for your consideration; but, in point of law, I think it my duty to state my opinion. If the *John Buddle* was so unmanageable that it was quite impossible to take the course directed by the rule, it was her duty to do the best she could to avoid the collision, and if she could not avoid it, then she must do that which is the next best, namely, render it as light as possible. It is not a question of putting the helm one way or the other; she must do the best the circumstances allowed, always presuming that she kept a good look-out; because, if the accident arose from her own neglect in not keeping a good look-out, her defence fails, and she ought to be responsible. You will consider whether there was a proper look-out kept on board. So much for the *John Buddle*: if she was unmanageable, she was right in taking the best measures she could adopt to avoid the collision.

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With regard to the *Eliza Ann*, the question is this: assuming the *John Buddle* to have been unmanageable, ought she, having kept a good look-out, to have seen her in time to have avoided the collision? Because, if the *Eliza Ann* saw the *John Buddle* unmanageable, with her head in the wind, the rule of the Trinity House cannot be said to apply to such a case. It might just as well be said that, if she had seen a vessel at anchor, she was to keep her course, and run her down. Therefore, you will have to consider, looking at all the circumstances of the

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case, whether those on board the *Eliza Ann* might have discovered the unmanageable condition of the *John Buddle* in time to have pursued measures to avoid her. The law is this. If both vessels are to blame, the damage must be shared between them; if one vessel only is to blame, then that vessel must pay the damage. But if, as may be the case here, these vessels accidentally came into close proximity, and the collision was purely accidental,—that is, the night not being very dark when the two vessels were approaching each other, if the *Eliza Ann* could not see, with a reasonable degree of care and caution, that the *John Buddle* had her head in the wind, and was unmanageable, and if the *John Buddle* could adopt no other measures than those she pursued, the collision was purely accidental, and each party must bear his loss.

You will have the kindness to tell me whether you think that this was a case of pure accident, or whether any blame attaches to either vessel.

OPINION.
JUDGMENT.

CAPTAIN REES.—We think it was a pure accident.

PER CURIAM.—This being the case, I must dismiss both actions, without costs. I should add, that my opinion entirely coincides with that of these gentlemen.

Proctors:—*Deacon*, for the *Eliza Ann*; *F. Clarkson*, for the *John Buddle*.

Prerogative Court of Canterbury.

2nd Sess.

JUNE 5.

Where a testator had cut out parts of his will, after execution:—Held that it was a revocation *pro tanto*.

IN THE GOODS OF WILLIAM COOKE, DEC. — *Motion, ex-parte*.—The testator died 16th January, 1847, leaving a will, dated 13th September, 1844, appointing J. W. and F. K. executors. The will, which was duly executed, exhibited certain mutilations on the first side, a portion of the

Third and the whole of the fourth lines having been cut out, apparently with a pair of scissors or a knife, or some other sharp instrument, and the two ends joined together with paste. The attesting witnesses, who had inspected the will at the time of execution, were enabled to depose that these mutilations were not therein at that time. The will was found, after the testator's death, in a box, in his bed-room, which was locked, the key being in his pocket. By reference to the draft of the will, it appeared that the words cut out of the first part of the third line were, "Harriet, the wife of Henry Lewin," and that the words in the fourth line cut out were, "each, I bequeath to Harriet, Elizabeth, and Sarah Woodington, spinsters, a legacy of nineteen guineas each." It was not known at what time these mutilations were made, save that Mrs. Lewin died in August, 1846, and in the summer of that year the testator had a violent quarrel with Harriet, Elizabeth, and Sarah Woodington. Proxies of consent to probate being granted of the will as it stands were executed by the parties interested.

Robinson, Dr., moved for probate of the will to the effectors in its present state. MOTION.

SIR H. JENNER FUST.—Part of the will has been removed, and the first inquiry will be, by whom the mutilation was made. The deceased had the will in his own possession, locked up in a box, and the presumption is, that it must have been done by him. Having ascertained this fact, that the will was in the deceased's own possession, and the presumption being that it was mutilated by himself, the question is, what is the effect of it? There is nothing on the face of the paper to shew what was the purport of the parts of the will now mutilated; but, upon affidavit, it appears that they contained legacies to certain individuals. The draft will is not before the Court, but that is stated to be the effect of it. Are there any circumstances which tend to shew when the mutilations were probably made? One of the legatees died in 1846, and nothing can be more probable than that her name was cut out in consequence of her death. With regard to the other legatees, the deceased had

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Cooke, dec.

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[TRIN. T.]

5.
-dec.

a violent quarrel with them in the summer of 1846, and the probability is that their names were cut out after that quarrel. These facts would have been required to be established by the deposition of witnesses upon an Allegation propounded by the will, but that the legatees who are excluded consent to probate passing upon affidavits. According to the present Act, to revoke a will otherwise than by writing, there must be a destruction of the will in some way or other. Cutting has been held to be a mode of destruction,* and accordingly of opinion that the Court must pronounce for this, therefore, is a revocation *pro tanto* of the will. I am accordingly of opinion that the Court must pronounce for the will as it now stands.

Will
anced for as
stands.

Toller, Proctor.

BAILEY AND JACKSON v. PARKES AND OTHERS.—Cause.
A testator, having executed a will, appointing A. B. and C. D. executors, and a codicil thereto, executes a "second" codicil revoking the appointment of A. B. and C. D. as executors, and appointing E. F. and G. H. as executors. The will (A), dated the 16th June, 1843, bequeathed the bulk of the testator's real and personal estate and effects to Messrs. Bailey and Parkes, as executors and residuary legatees in trust. A codicil (D), dated the 8th July, 1844, revoked the bequest in the will of a sum of £9,000 stock in trust for the testator's niece, Mrs. Parkes (wife of the executor), and gave her the same absolutely. A codicil (B), dated the 29th November, 1845, described as a second codicil to the will, revoked the first codicil (D), and substituted Mr. Jackson as a second executor and trustee, and substituted Mr. Jackson as his present and also revoked the appointment of Mr. Parkes under the will, as executor and trustee, and substituted Mr. Jackson.

* *Hobbs v. Knight*, 1 Curt. 768.

A codicil (C), dated the 5th January, 1846, described as a third codicil to the will, recites the will and "the first two codicils" by date, and that, by his "said will and codicils," or some or one of them, the testator had directed his trustees, "who are at present Mr. Bailey and Mr. Jackson," to transfer and deal as directed with the sum of £9,000 stock, and hold the same upon trust for the separate use of Mrs. Parkes; declares that his present intention was to advance a part of that sum for her benefit; and whereas Mr. Parkes, her husband, was indebted to him, the testator, he desired that the sums due to him should go in part satisfaction of the legacy of £9,000, and he directs that all advances for the benefit of Mrs. Parkes, and all debts due to him at his death from Mr. Parkes, should be taken as part of such legacy; and in all other respects he "ratifies and confirms his said will and former codicils:" and the attestation-clause describes the instrument as "a third codicil" to the will.

The Allegation, on behalf of Messrs. Bailey and Jackson, propounding the papers (A), (B), and (C), pleaded the making and execution of them; that by the codicil (B) the testator revoked the codicil (D), and that the words at the commencement of the codicil (C) referring to the revoked codicil (D), and the words at the conclusion of the codicil (C) whereby the codicil (D) is apparently ratified and confirmed, were therein inserted by W. S., the solicitor who drew the codicil (C), without any intention of thereby reviving the codicil (D).

Witnesses were examined upon this Allegation, including W. S., the deceased's solicitor, who drew the codicils (B) and (C).

The suit was an amicable one.

Deane, Dr., for Mr. Parkes.—The testator was dealing with this £9,000, and from time to time he altered the way in which it was to go, and the codicils being inconsistent one with the other, the question of their construction must go before another Court, and the last codicil (C), described as the third, referring so expressly to the codicil (D), ratifying and confirming it, this Court can hardly avoid pronouncing for all three codicils. It does not appear from the

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evidence was not admissible to explain the testator's intention in the third codicil, and that all the papers were entitled to probate, but that A. B. and E. F. were the only executors entitled to take it.

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Dec. 18.
ARGUMENT.

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evidence of W. S., the drawer, that the deceased did not intend to revive the codicil (D). The Court must, therefore, grant probate of all the papers, leaving the construction of them to the Court of Chancery.

Jenner, Dr., contrd.—The effect of pronouncing for all the papers would be, that the Court would give its authority to a revoked paper as part of the will, and Mr. Parkes must be considered as an executor and a trustee, a Court of Construction having no power to remove him; whereas, in the last codicil, the testator recognizes as his only executors and trustees Messrs. Bailey and Jackson. "Whereas by my said will and codicils, or some or one of them, I have directed the trustees thereof, who are at present Jacob Bailey and Andrew Jackson." [PER CURIAM.—What is the meaning of "who are at present?"] He confirms the paper (B) in which Messrs. Bailey and Jackson are named trustees and executors, to the exclusion of Mr. Parkes; and the last codicil declares that, if the testator should purchase any property from Mr. Parkes, in part satisfaction of his debt to him, he bequeathed such property in trust to Messrs. Bailey and Jackson, not including Mr. Parkes. [PER CURIAM.—I should like to have some further explanation from W. S. as to how this codicil came to be so drawn up. I never read stronger words. At present, I have no means of understanding it.] The words "ratify and confirm" are not equivalent to "revive." [PER CURIAM.—I never remember a case of so much difficulty. Observe, the first codicil (D) is not propounded. I must have some further information before I can dispose of the case. I feel this difficulty: the codicil (D) was revoked, and could only be revived, according to the Act, by an instrument regularly executed shewing an intention to revive it. Here is a codicil reciting the revoked codicil, and ratifying and confirming the will and the former codicils.]

Conclusion
 rescinded. —
 Additional Ar-
 ticle.

The case having stood over, the Court, at the prayer of the Proctor for Messrs. Bailey and Jackson, rescinded the conclusion of the cause, for the admission of an Addition:

Article, which pleaded that, between the dates of the codicils (D) and (B), the testator had become dissatisfied with Mr. Parkes, and declared that, in consequence thereof, he executed the codicil (B) ; that, in December, 1845, the testator wrote a letter to his solicitor, W. S., respecting the codicil (C), in which he said, "I wish, in addition to my last codicil, to execute another, confirming the appointment of Mr. Jacob Bailey and Mr. Andrew Jackson, as my executors and co-trustees," and that this letter formed the sole instructions for the codicil (C), the solicitor having had no personal interview with the testator on the subject of that codicil, which was drawn, without further reference to the testator, by a conveyancer, by whom the words at the beginning and end, reciting the codicil (D), and ratifying and confirming the former codicils, were inserted without due consideration, he and W. S. acting under the erroneous impression that the codicil (D), though revoked, yet, remaining uncanceled, still formed one of the testamentary papers of the testator, who, by the execution of the codicil (C), did not intend to revive or reinstate any part of the codicil (D).

This Additional Article was opposed by

Deane.—The object of this Article is to let in evidence on which the Court may put a construction upon the paper otherwise than it bears upon the face of it. But the meaning is so plain and obvious, that the Court is not at liberty to receive evidence to the contrary. Were the words of the testator not so sensible as to stand by themselves, there are authorities which shew that this Court, as to the *factum*, has refused to receive evidence to control the meaning of such words, even before the present Act. A question arises on the words in the 22nd section, "shewing an intention to revive." Without reference to cases, one would suppose that if the testator shews a clear intention on the face of the instrument, and the words cannot be otherwise understood than as reviving the paper, the intention of the Statute is that no counter-evidence shall be received. *Jarman, On Wills.* Walpole v. Cholmondeley.† Skinner v. Ogle.‡*

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1847.
Feb. 3.
ARGUMENT.

* 1 Vol. 173.

† 7 T. R. 138.

‡ 4 Notes of Ca. 74.

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Suppose the deceased had revoked two papers, one as to the £9,000, the other as to the appointment of executors, would the Court be at liberty to receive evidence *dehors* as to his intention? [PER CURIAM.—The question simply is, whether parol evidence can be received or not—whether the intention of the deceased is to be collected from the paper itself, or from parol evidence. The case seems to come nearest to that of *Greenough v. Martin*.*] In *Skinner v. Ogle*, the Court adopted the words of Mr. Jarman, who says that the intention of the testator must be collected from the contents of the instrument itself. The rule was laid down by Sir John Nicholl, in *Bayldon v. Bayldon*.† All the authorities are referred to by Mr. Justice Williams.‡ In *Thorne v. Rooke*,§ the Court said that, in all cases, the Court looks to the paper itself to see if there be any ambiguity. [PER CURIAM.—How does a question of ambiguity arise here?] I apprehend there is no ambiguity. [PER CURIAM.—It is a question of construction, not of probate. I cannot separate parts of the instrument, and grant probate of one part and not of another.] If the Court rejects the paper (D), and we go to a Court of Construction, that Court will not look at any paper not admitted to probate.

Jenner, contra.—This was a mistake of the conveyancer and of W. S., who instructed him. The Article shews a difference between the instrument and the instructions: the intention of the testator is to be collected from his letter and the explanation of W. S. The Court must put a construction upon the papers if it grants probate of them, otherwise, to whom would it grant probate? [PER CURIAM.—I do not see my way through the case. All the information I get is from W. S., that it was a mistake, committed under an erroneous impression that a revoked codicil continued to form part of the testamentary disposition of the deceased, provided it remained uncanceled. This should appear on the face of the paper, and the question is, whether I can receive evidence as to the non-intention to revive the codicil

* 2 Add. 239.

† 3 Add. 232.

‡ Law of Ex. c. iii. § 5.

§ 2 Curt. 811. 1 Notes of Ca. 259.

which had been revoked. It is all intention. If there is no doubt on the face of the paper, I require no evidence. Do the words necessarily shew an intention to revive? *Deane*.—The chief difficulty arises from the words “at present”—who were the executors “at present?”] If the testator intended to re-admit Mr. Parkes as executor, he would have gone on to shew it in other parts of the codicil; but, on the contrary, he speaks of Mr. Bailey and Mr. Jackson only as his executors. [PER CURIAM.—Another difficulty of the Court is this: it has already the parol evidence of W. S. before it.]

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SIR H. JENNER FUST.—I shall reject this Article, and JUDGMENT. assign the cause for sentence on the second assignation. How I am to get through the case I cannot at present see. Article re- I cannot understand how such an impression could have got jected. into the mind of any professional person, as that a revoked codicil could still form part of a testator's will.

The cause now came on for hearing.

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Deane asked for probate of all the papers to the three executors named therein. [PER CURIAM.—The only question is, to whom probate is to be granted.] ARGUMENT.

Jenner, contrà.—If it has not been done here, no testator can revoke the appointment of an executor by a codicil.

SIR H. JENNER FUST.—There never was a case before JUDGMENT. the Court in such a complicated state of circumstances, and where there had been such a strange misunderstanding of the law. The deceased executes a will, appointing Mr. Bailey and Mr. Parkes executors. He then executes a codicil, confirming the will. Then he executes a second codicil revoking the first, and revoking the appointment of Mr. Parkes as executor, substituting Mr. Jackson, and confirming his will. Lastly, he executes a “third” codicil (so described), reciting the two former codicils by date,—the first codicil being thus referred to as a subsisting codicil, though revoked in terms,—and he

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Probate of
all the papers
to Messrs. B.
and J.

concludes this codicil in these words: "And in all other respects, I do hereby ratify and confirm my said will and former codicils." What will and codicils? The will and codicils referred to at the commencement of this instrument. He confirms the codicil which had been revoked by the preceding codicil, and gives effect to that codicil in every respect. I cannot understand how it can be revoked in part and not in the whole; if he confirms it, he confirms the whole, but has revoked the appointment of Mr. Parkes as executor under the will. How can I say that Mr. Parkes has established his right to probate of the will as one of the executors? For he is to establish his right against the codicil which revoked his appointment, and if I grant probate to Mr. Parkes as one of the executors, I pronounce that that codicil is good as to part, and bad as to the other part. My opinion is that Mr. Parkes has not established his right to be an executor and to have probate of the will and the three codicils, and that Messrs. Bailey and Jackson are the parties entitled to probate, as the only executors. What the effect of this decision may be elsewhere I cannot say; this Court has only to decide whether the papers are entitled to probate, and who are the parties to take it; and I am of opinion that all the papers are entitled to probate, and that Messrs. Bailey and Jackson are the persons entitled to take it.

Proctors:—*J. B. Puckle*, for Bailey and Jackson; *Neve*, for Parkes.

High Court of Admiralty.

3rd Sess.

JUNE 11.

Costs. —
Where a bot-
tomry bond had
been pronounc-

THE "CATHERINE."—*Act on Petition*.—This was originally an action upon a bottomry-bond, dated 5th July, 1845, for £3,099, upon the brig *Catherine* and her cargo, by

Messrs. Bell and Grant, the holders. The Surrogate, on the 3rd September, 1845 (there being no opposition), pronounced for the validity of the bond, and referred the amount to the Registrar and Merchants, who, on the 12th December, 1846, reported that the sum of £411 only was due upon the bond, which Report was confirmed by the Surrogate, at the prayer of the bondholders. The owners, under the circumstances, considering the large reduction of the claim of the bondholders, and the expenses to which they (the owners) had been put in the investigation of transactions which they alleged to be fraudulent, in respect to the bond, prayed the Court to condemn the bondholders in all the costs of the reference.

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Catherine.

ed for by consent, and the amount referred to the Registrar and Merchants, who disallowed £2,688 out of £3,099, — the Court condemned the bondholders in the costs of the reference.

The facts are fully detailed in the Judgment.

Addams and Bayford, Drs., for the owners.—The question is, whether, upon general principles, the underwriters, who did not dispute the validity of the bond, after £2,688 has been disallowed out of £3,099, and a case has been made out of the grossest fraud, on the part of those concerned in Portugal, which ever came before this Court, should be made to pay the costs of the reference.

ARGUMENT.

Haggard, Dr., for the bondholders.—The bond was given by an Englishman; it came in a regular way into the hands of Messrs. Bell and Grant; it was allowed to be pronounced for unquestioned, though the parties interested were in England, with all the means of information from the master and crew of the vessel. This is the first instance in which the Court has been called upon to visit bondholders with a total loss because a large sum has been disallowed on account of the ship.

DR. LUSHINGTON.—If it were now any part of my duty to decide upon the validity of the bond, or to pronounce any opinion as to the correctness of the Report made by the Registrar and Merchants, there are very many of the facts and circumstances noticed by Counsel, and very many of their arguments, which would be deserving of very serious consideration. But, in my opinion, my judgment upon the present occasion must be governed by principles uni-

JUDGMENT.

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Facts.

versally acknowledged, and uniformly acted upon, in these Courts, in every case whatsoever, where such principles are properly applicable.

To look, in the first instance, at some few of the facts that have led to the present litigation:—It appears that the vessel proceeded against was stranded on the coast of Portugal, in April, 1845, and that, being so stranded, some expenses were necessarily incurred for the purpose of effecting repairs which were indispensable to enable her to prosecute her voyage to this country, she being bound to various ports in England, with a cargo of wine. For the amount of these expenses, a bottomry-bond, bearing date the 5th of July, 1845, was signed by the master for the sum of 3,099/. The vessel reached this country at the end of July or beginning of August in the same year, and an action was then entered by Mr. Poynter, on behalf of Messrs. Bell and Grant, for the sum of 3,300/., and a warrant was extracted. It appears that Messrs. Bell and Grant (according to their own statement, contained in the original affidavit) stood in the following position: Mr. Grant swears that he is one of the partners in the firm of Bell and Grant; that the deponent became an agent to Morgado and Co., of Olhao, in the kingdom of Portugal, and, by indorsement of it, they are legal holders of this bond, granted by Thornton, the master of the *Catherine*, for advances made for the benefit of the ship. It appears by the bond itself, to have been indorsed in the following terms:—"Pay to Bell and Grant, or order, of London, the within-mentioned sum,—dated Olhao, the 7th of July, 1845;" and it purports to be signed by Morgado and Co. I apprehend it is of no importance whether this bond was held by Messrs. Bell and Grant in the character of agents, acting on commission, or whether it has been assigned to them for a valuable consideration; because I take it that the principle is undoubted in either case. They must stand in the shoes of, and precisely in the same position as, the original holder of the bond; they can have no other advantage than he was entitled to, and they are subject to all the liabilities in law and equity to which he would have been subject. This being so, an appearance was given by Mr.

Clarkson, on the 3rd of September, on behalf of the owners of the ship, and he then admitted the validity of the bond, and afterwards the Surrogate pronounced for its validity, and ordered the accounts to be referred to the Registrar and Merchants, who made a Report, on the 12th of December, 1846.

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I think it expedient to consider a little what is the effect of pronouncing for the validity of a bond, and the reference to the Registrar and Merchants, in the first instance. I apprehend that, when once the Court has pronounced for the validity of a bond, whether it be done by the consent, or against the will, and in opposition to the wishes, of the party who defends it, in that case the validity of the bond is finally and completely determined, so far as this Court is concerned; and unless that judgment be appealed from, the Court must consider it as a valid bond. But when the Court pronounces for the validity of a bond, it gives no opinion as to the amount due under it. It is one of the most convenient and beneficial practices which this Court can uphold, to pronounce for the validity of a bond by consent, and refer the amount to the Registrar and Merchants. It is obviously so to all parties who seek justice, because the party proceeding gets, in the first instance, the realization of his security, whether it be the ship, cargo, or freight, or whether it be a remedy against the bail, and no man ought to seek to recover more than that which is justly due to him. It is beneficial to the other party, namely, the persons who have to pay the bond, because they have as good a mode of ascertaining the real amount of the expenditure as is possible to be afforded in any other way. I apprehend that a reference to the Registrar and Merchants is as little expensive and as certain in its result as any reference can be out of Court to any number of merchants selected in any manner whatsoever. Now a reference being made to the Registrar and Merchants, the Court, unless it is called upon by one party or the other, never interferes until the Report is made; but it is always ready to interfere if the interests of justice require it. It is always ready to allow more time to the one side or to the other; to the one, to

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establish the demand if it be just; to the other to shew it is unjust, if, in the opinion of the Court, a sufficient opportunity has not been afforded to the parties of obtaining justice. In this case there was no such application during the long period which elapsed from the time when the validity of the bond was pronounced for, in September, 1845, until the Report was made, on the 12th of December, 1846, and no doubt very ample time was given for all parties to establish their rights, whatever those rights may be. I say "establish their rights," because, in the first instance, what is to be done? He who claims under a bond pronounced valid, must shew what he has expended, what he is entitled to under the bond, whatever be its nominal amount. Upon him is the *onus probandi*, as he is the plaintiff, as it is upon every person who is to establish an affirmative: and he has every advantage. He ought to keep regular accounts and regular receipts, and to produce those accounts; and if they are fair and just, he is entitled to all his expenses attending the establishing the accounts, and to interest. Bondholders have no right to complain in this Court that they have not ample, full, and complete justice.

Result of the
Report.

The result of the Report is this: that the sum of £3,099 having been the amount sued for, and mentioned in the bond, the Registrar and Merchants have pronounced for the sum of £411 only as due; or, as Dr. Addams has stated, they have deducted no less a sum than £2,688. The Registrar and Merchants' Report has been confirmed by the Court, and it matters not, in my opinion, whether at the instance of one party or the other. It has been confirmed by the authority of this Court, and has not been objected to; and I am bound to consider it as a decision by a competent authority, with which even I, under existing circumstances, have not the slightest right to interfere, unless indeed it was shewn to me that some very peculiar circumstances had arisen to prevent the parties objecting,—*res noviter perventa ad notitiam*,—into which the Court might think it fitting to inquire.

Principle of
costs.

Now on what principle stand costs in cases of this description? I apprehend, upon very clear and very decided

principles. If a party proceed in a cause, whatever may be the nature of it, and, on a reference being made to the Registrar and Merchants, that party has made an exorbitant and extortionate demand, the party having preferred such a demand, according to every principle of justice and equity, must pay all the expenses incurred by the other party in resisting it. I say "exorbitant and extortionate:" I do not mean to say that, in ordinary references to the Registrar and Merchants, where there may be small items taken off, or a doubt may exist whether sums are substantiated, in such cases, the principle I am now laying down would at all apply. But one of the many ingredients which must govern the proceedings of the Court in all these cases is the proportion of the amount taken off to the sum demanded. If that be in the very large proportion of £2,688 to £3,099, then, *prima facie*, the party has made an exorbitant demand, and he must pay the expenses of the reference, and indemnify the opposing party for every farthing of the expense incurred in resisting it.

— It has been said, this is the first instance. Whether it be so or not,—I have not taken upon myself to consider whether it is the first or the last of one hundred,—it stands on the same eternal principle of justice, from which I cannot depart, namely, that where a party prefers a claim for an amount which has no substantial foundation in truth, justice, or equity, he should always indemnify the man whom he has so unjustly sought to injure. *Prima facie*, I have not one shadow of doubt that I ought to condemn Messrs. Bell and Grant in the costs of the reference, for it is the costs of the reference, and nothing else, respecting which my judgment is now called for.

Let us see what they have stated, and what has been urged on their behalf, either in the Act on Petition (in the Answer to the Act), or what has been said by their Counsel. With regard to the *bona fides* of the transaction, I do not apprehend that the Court is under the necessity of pronouncing any opinion upon it whatsoever. The true question is, not whether Messrs. Bell and Grant have acted from the commencement of the transaction *bona fide*, but whether

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the other party.Case of the
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the party who has put them in motion has been justified in demanding £3,099. Here, again, I take it that the principle is as clear as daylight; that you cannot separate Bell and Grant from Morgado and Co. (if there be such a firm), or from Mr. Pinder, or from anybody else: they stand, I repeat, in the shoes of the original parties, entitled to the same advantages and subject to the same liabilities. If they are acting as agents, they cannot complain, because they take their commission upon the ground of certain risks they run on the faith and credit of the persons for whom they act. So much as to the *bona fides* of the case. I do not think it necessary in the slightest degree to enter into any consideration as to whether Messrs. Bell and Grant ought to have been more on their guard, under existing circumstances, or whether they have been deceived by those with whom they corresponded. I do not mean to fix the slightest imputation upon their *bona fides* in any part of the transaction. Neither do I think it necessary to enter into another question, which has been largely discussed, whether the whole was not concocted in fraud, and whether all the accounts were not exorbitant, or totally false. I do not think it necessary to decide this point. I want to see whether the presumption, that Messrs. Bell and Grant ought to pay the costs, is rebutted by any thing they have said in their Answer to the Act.

Now I must of necessity look rather minutely to the real substance and contents of the Answer to the original Act on Petition. After going through the proceedings before the Registrar and Merchants, and the confirming the Report, it goes on thus: "That the master and mate were present in the Registry on such occasion, and made certain averments (not on oath) to impugn the said account; but Poynter alleged that he at such time protested, and still protests, and now submits, that the averments of the said persons, especially the master, as impugning his own act, ought not to have been received." Now, the main part of the Argument has hinged upon this: in what light I am bound to treat this averment, and the effect it ought to produce upon my mind. First, I presume it is, to all intents and purposes, a true and accurate averment, that £969 is

admitted to be due from the owners as incurred on account of the ship and cargo. It is a little difficult for the Court to say, assuming this statement to be correct, why the Registrar and Merchants did not allow the bond to that extent. They have refused to allow that part of the claim, and to what conclusion am I to come? The only conclusion I can come to is, that they considered that this amount formed no part of the bond. The Registrar and Merchants excluded it from their Report, and how can I conclude that it formed part of the bond, when it was excluded from their Report, which was not objected to? This is one view of the question, and it is absolutely conclusive of it. But let us see how it stands in another point of view. I have had an opportunity of looking at the accounts. It is said there was an admission,—and I hardly think it can be characterized as any thing but an admission,—by the owners of the freight and cargo, that £989 was really due on account of expenses incurred in the repair of the vessel and on account of the cargo. I understand, first, that the Registrar and Merchants have not allowed this amount; and, secondly, that there has been no appeal against their judgment; though an admission by a party is an admission which may be taken against him. Now there is a document coming from Mr. McIlean, who was employed in taking an inventory of the expenses incurred on account of the ship. I was at the first view staggered at the heading of this document, as it is very much of the nature of an estimate, and looking at the document itself, it is not of the nature of an account, and is nothing more nor less than an estimate as to what could be done on the spot, and, as compared with other vessels, according to his own notion, what ought to be fair charges.

Supposing all to be taken as true, what is the result? According to the determination of the Registrar and Merchants, no less a sum than £2,600 would have been over-demanded. Now when I look at these facts and circumstances, I think it is utterly impossible that either I, or any other judge, could hesitate one single moment as to the conclusion to which I must come. I think it my duty, first, in justice to the party proceeded against, who has been

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thus unnecessarily and improperly—I will not say fraudulently, because it is not requisite that I should use such a word, but improperly and unnecessarily—put to an enormous expense. But, as far as the Court has power or authority, I will prevent that party suffering further loss. I speak also for another reason not less important than the preservation of the rights of individuals, namely, that this may be a caution to others, that when British ships, or any other ships, coming into a British port, may happen to meet with the misfortune of being stranded, and require repairs, in any part of the world whatsoever, if bottomry-bonds are taken to an exorbitant extent, and they are put into suit in this Court, I will, on behalf of British merchants, as well as foreign owners, take care to prevent, to the utmost extent of my power, a repetition of any such disgraceful proceedings as have taken place in this cause. I condemn the party in the costs of the reference.

Condemned
in the costs.

Addams.—And the costs of this proceeding?

PER CURIAM.—Yes.

Proctors:—*Poynter*, for the bondholders; *F. Clarkson*, for the owners.

Prerogative Court of Canterbury.

3rd Sess.

JUNE 15.

The appointment of executors, written across the will, drawn on a printed form, included in the probate.

IN THE GOODS OF WILLIAM LOTT RYTON, DEC.—*Motion, ex-parte.*—The testator died a bachelor, leaving a niece, his only next of kin. He left a will, dated 12th November, 1840, written by himself, upon one of the printed forms sold as “Will papers,” which is signed by him at the foot and attested by two witnesses. Across the paper is written, also by the testator, “I direct and appoint Sarah Wood and Thomas Ward Andrews to be my joint executors. William Lott Ryton.” The subscribed witnesses de-

posed that, on the day of the date of the will, the testator produced it, written and signed, and, stating that it was his will, requested them to witness it, acknowledging his signature at the foot in their joint presence; and that they, in his presence, subscribed their names thereto, but neither noticed the writing across the will. Directly after the execution, one of the witnesses left the room; the other remained with the testator, who, in his presence, sealed up the will in an envelope, without having written any thing across it after the witnesses had attested. On the same or ensuing day, one of the witnesses mentioned to Elizabeth Andrews (wife of Thomas Randle Andrews), the testator's niece, that he had witnessed his will, and on that same day, the testator delivered to Mrs. Andrews the will sealed up, which she immediately gave to her husband, one of the executors named in the clause written across the will (but therein by mistake called "Thomas *Ward* Andrews"), and it remained in his possession unopened until after the death of the testator, amongst whose papers was found a draft of the will, containing the same clause written across it, with the words "The original will to Thos. Andrews' keeping," written beneath.

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Ryton, dec.

Addams, Dr., moved for probate to Mr. Andrews, the surviving executor. [PER CURIAM.—Which signature did the deceased acknowledge?] It must have been that at the bottom of the will.

SIR H. JENNER FUST.—The will in this case (which presents a new feature) is written upon a printed form. In such cases difficulties often arise, and I must, as far as I can, discourage the use of these printed papers, as they open a door to fraud, and not only so, but deceive people. If this will had not been written upon a printed paper, the clause as to the appointment of executors would have been in its proper place, not where it is. The witnesses are unable to say whether this clause was in the will at the time when it was produced to them by the deceased, and he acknowledged his signature to it: so that it is clear the signature he did acknowledge was that at the bottom of the will, and not the signature across the will. *Primâ*

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facie, the clause would be an addition to the will. But something more took place at the time of execution, for it appears, after the deceased had acknowledged his signature to the will and the witnesses had attested it, one of them withdrew, and the other remained with the deceased, who sealed up the will in an envelope, without writing any thing more upon it, and the will was delivered thus sealed up to the wife of the executor, who gave it to her husband, in whose custody it remained sealed up until after the death of the deceased. There is another circumstance: a draft of the will has been found, in the deceased's handwriting, with the same clause written across it, though I do not know that this carries the case very far. Mrs. Wood, the deceased's sister, appointed executrix, died in the deceased's lifetime, and Mrs. Andrews, the niece of the deceased, and wife of the executor, is the only next of kin, and, as such, is entitled to the residue of the property. There is another difficulty: the deceased has written one of the christened names of the executor "Ward" instead of "Randle;" but I think this mistake is sufficiently accounted for. Under the circumstances, I am of opinion that there is sufficient to shew that his signature was acknowledged by the deceased to the witnesses, the clause appointing the executors being then written upon the will, at the time of execution, on the 12th November, 1840, on which day it was sealed up in an envelope, and I therefore decree probate of the will to Mr. Thomas Randle Andrews, the surviving executor named therein.

Probate de-
creed.

Deacon, Proctor.

Consistory Court of London.

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Divorce by reason of cruelty, by the wife against the husband, sustained
SAUNDERS v. SAUNDERS.—*Cause*.—This was a suit for a divorce by reason of cruelty, promoted by Mrs. Catherine Saunders against Mr. John Saunders, her husband. The Libel pleaded as follows:—

1 & 2. The marriage of the parties (he being a bachelor and she a spinster) on the 9th August, 1825, at South Leith, N.B., according to the rites and ceremonies of the Church of Scotland; their cohabitation in England, and the birth of four children. 3. That a marriage portion of £1,000 was paid by the father of Mrs. Saunders to Mr. Saunders, and that no settlement was made in her favour. 4. That, from 1839 or 1840, Mr. S. uniformly treated his wife in a very harsh and unkind manner, and frequently, without any just cause or provocation, grossly abused and insulted her, and on many occasions struck her, and dragged or pushed her about the room, and used other personal violence towards her, as hereinafter more particularly pleaded. 5. That, on a Sunday afternoon, in June, 1842, the parties being in the drawing-room of their house, Mr. S. accused his wife of not using her influence with the family of a neighbour to induce him to cut or lop some trees which intercepted the view from the windows, and thereupon, without any other cause or provocation, he flew into a violent passion with her, seized her by her clothes, and violently dragged or pushed her up and down the room for several minutes, until from terror and exhaustion she fell down in a fainting state, in which situation she was found by the servants and others, who, attracted by her screams, had come to her assistance, and by whom she was assisted to bed. 6. That, shortly after this occurrence, namely, in the latter end of June, 1842, Mrs. S., who was then in a weak and nervous state, in consequence of her husband's ill-usage, went to Leith, on a visit to her parents, and remained with them about three months, during which she partially informed her father of the ill-treatment she had experienced from her husband, with whom her father personally remonstrated, and threatened him with legal proceedings if it was repeated, when Mr. S. admitted to him that he had ill-treated his wife, but promised to treat her in a kind and proper manner if she would return to cohabit with him, and which, on the faith of such promise, she accordingly did. 7. That, in December, 1842, Mrs. S. discharged from their service Eliza Mayhew, for whom Mr. S. avowedly entertained a great and improper partiality, but she suffered her to remain in the house until February following, having no fault to find with her; that Mr. S. evinced great distress of mind at her discharge, and urged his wife to take her back again, at times declaring that, if Mayhew did not come back, he should go out of his mind, and would go off with her if he thought she would consent; that, Mrs. S. refusing, he became outrageous in his behaviour towards her, frequently alluding to

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almost entirely by the evidence of the children and near relations of the parties, but who saw no act of personal violence on the part of the husband, except his pushing the wife, and spitting in her face. — The effect of the last-mentioned act, as an act of cruelty.

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her refusal to permit Mayhew to return, and declaring that she should rue the consequences of it; that the mother of Mr. S., to whom he made no secret of his affection for Mayhew, expostulated with him on the impropriety of his conduct, but quite unavailingly. 8. That Mr. S. often declared it to be his wish and object to drive his wife from his house, or induce her to quit it, frequently saying to her, tauntingly (sometimes with oaths), that she was a mere Scotch beggar, or she would not stay to be treated in such a way, and also that, if she had been an Englishwoman, she would have gone away long before; asking her, "Why don't you go?" and concluding, "It will be the happiest day of my life when you leave the house." 9. That Mr. S., in furtherance of his avowed object aforesaid, repeatedly, previous to November, 1845, without any provocation, grossly abused his wife, charging her with being a liar, and calling her a brute, a hell-cat, and other such opprobrious epithets, and also, at many of such times, pushed or dragged her about the room, pulled her nose, struck her upon or spit in her face, to her great pain, terror, and alarm, as well as infinite disgust; that such pushing or dragging about the room was overheard by persons in the house, who, on one or more of such occasions, found her, presently after, lying or sitting on the ground, in a very distressed and exhausted or fainting state, when Mr. S. endeavoured to excuse himself by saying he had only given his wife a push or slight shove. 10. That, in October, 1845, Mr. S. falsely accused his wife, in violent and abusive terms, of misapplying money he had given her, and of inciting his sons to disobey his orders, and concluded by spitting in her face, and that on J. M. S., one of his sons, coming into the room soon after, and whilst Mrs. S. was remonstrating with her husband on account of such conduct (naming it), he said "And here it is again," and repeated it, in the presence of his son, and afterwards, in reference thereto, said he did not think the law could take hold of that. 11. That Mr. S., with the view and intention of vexing and annoying his wife, wilfully and grossly affronted her relations, so as to drive or keep them from their house. 12. That, on the 1st November, 1845, after Mrs. S. had retired to her bed-room, Mr. S. came into it in a very irritable and excited state, bringing a large bundle of tradesmen's bills, which he had refused to settle, falsely alleging that she had robbed him of the money intrusted to her to pay them, and after accusing her of telling lies, dashed the bills against her face and left the room. 13. That, during the night aforesaid, Mrs. S., who had, through her husband's ill-treatment, become reduced to a very nervous, debilitated, and precarious state of health, and was too much terrified to remain alone

with him, left his bed, and retired to a separate bed-room, and from that time she continued to occupy a separate bed-room until she left his house. 14. That, on Sunday, the 9th November, 1845, Mr. S. tried to persuade her to return to and sleep with him, which she refused to do without his solemn promise to abstain from ill-treating her, whereupon he began pushing and driving her about the room until interrupted by one of the servants, when she escaped to the bed-room she had lately occupied, Mr. S. following her, and knocking and kicking violently against the door; that, on the next day, he had all the bedding removed out of the room, thereby forcing Mrs. S. to have a bed prepared for her in one of the attics. 15. That, on the night of the 15th November, after all the family had retired to rest, Mr. S. went up to the attic, then occupied by his wife as her bed-room, and, bursting open the door with great violence, seized and struck his wife, and tried to force her down stairs, which she resisted, and, after a struggle, she escaped from him into an adjoining attic, occupied by one of her sons; that the conduct of Mr. S. was so outrageous as to disturb the whole family (including their two sons, and Miss S., the sister of Mr. S., then staying at the house expressly for the purpose of protecting Mrs. S. from her husband's violence), who assembled and passed the remainder of the night in the attic, in alarm, in consequence of the state of almost phrensied violence into which Mr. S. had worked himself; that, on the following morning, Mrs. S., being strongly advised by her husband's sister, and also by her own sons, to leave the house, as they could no longer protect her, or be answerable for her personal safety, yielded to their advice, or rather earnest entreaty, and in company with Miss S., quitted the house, and placed herself under the protection of the mother of Mr. S., with whom she had since resided separate and apart from her husband.

An Allegation was admitted on the part of the husband, which counterpleaded in one general article the charge of cruelty, and annexed in supply of proof certain letters from Mrs. Saunders to her husband and to others, bearing date in 1840, 1842, and 1845.

Addams, Dr., for the wife.—The conduct of the husband, April 22.
as proved by members of his own family, amounts to legal ARGUMENT.
cruelty. Spitting in the wife's face is an act of gross cruelty.
D'Aguilar v. D'Aguilar.* Shelford.† In *Cloborn's Case*,‡

* 1 Hagg. E. R. Supp. 776.

† On Marr. and Div. c. v. § 4, p. 430.

‡ Hetley, 149.

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where such an act was proved, a Prohibition was refused. The letters of the wife to the husband, written in affectionate terms, are no disproof of the charges.

Robertson, Dr., on the same side.

Bayford, Dr., for the husband.—The parties lived together for fourteen or fifteen years before any matter of complaint is alleged to have occurred. The first charge of cruelty is in 1842, when the wife fell down through terror or in spite, not from being pushed down. Different versions of the occurrences are given by the witnesses, and one of the persons present on one occasion, Eliza Mayhew, is not examined. The proof of cruelty fails. There is no case in which a divorce was pronounced upon the single isolated fact of the husband's spitting in the wife's face. In *D'Aguilar v. D'Aguilar*, where such an act occurred, there were adjunctive acts; and in *Cloborn's Case*, the husband, besides spitting in the wife's face, gave her a box on the ear, whirled her about, and called her a foul name. The wife, in the present case, was persuaded to leave her husband by the husband's sister, who was the person alarmed, not the wife.

R. Phillimore, Dr., on the same side.—*Cloborn's Case* rests upon Star Chamber law only. [PER CURIAM.—The effect of that case is, that one of the Judges said that spitting in the face "was certainly cruelty, for it was punishable by the Star Chamber." There is no case in which a divorce was granted for such an act alone; it is not likely that there should be such a case.] In this case there is no evidence of any bruise, or of any act of personal violence seen, or of any words of menace, threatening health, limb, or life; nor any declaration of the wife, *recenti facto*, that she had received any bodily injury from her husband. The wife does not withdraw from her husband's bed through any fear of her personal safety. The real cause of their differences was the wife's so withdrawing herself, whereby she was guilty of an ecclesiastical offence. *Brisco v. Brisco*.*

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 JUDGMENT.

DR. LUSHINGTON.—The parties in this case were married

* 2 Add. 259.

in August, 1825, and were separated, after the expiration of twenty years' cohabitation, on the 15th November, 1845. On the 26th January, 1846, the Citation, in a cause of separation by reason of cruelty, at the instance of Mrs. Saunders, was returned into Court. It appears that Mrs. Saunders was by birth a Scotchwoman, and in Scotland her own relatives resided. Mr. Saunders lived chiefly at Woodford, in Essex. There were issue of the marriage four children, three of them boys, who have been examined in the cause.

The evidence is not voluminous; eight witnesses only have been examined, and those on the Libel given in by Mrs. Saunders; for, although Mr. Saunders has given in a Responsive Allegation, which was admitted, no witnesses have been examined thereon. It is, I think, somewhat peculiar that of those eight witnesses all should be relations, and very near relations, of the parties, with the exception of one—Mary Ramsay. It is peculiar, too, that the mother and sister of Mr. Saunders, and three of his sons, should be five out of seven of such relations, and that the cause should come to be decided upon their evidence, without any opposing testimony whatever. But, though I may think this somewhat singular, yet, as causes of this description involve transactions of so private and domestic a kind, there may be reasons to account for this peculiarity. However that may be, my judgment, I must take care, must not be affected by any such circumstance. It may be well, indeed, to remark, that I agree with Dr. Addams in his observation, that, *primæ facie*, the presumption is, that near relations of the husband, if biased at all, would be biased in his favour. As to the children of the parties, there is no such presumption either way; but with respect to all near relations, there is always a fear of partisanship, which induced the Court to consider with care whether the statements of such witnesses are not overcharged.

It is now necessary to examine the acts of cruelty which have been charged in the Libel, and the evidence in support thereof. General rules or principles I need not advert to, for they are well known and acknowledged by all; the difficulty lies in their application.

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of the parties.

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In this, as in all cases of the same kind, all the circumstances together must be taken into consideration ; for the question is, not whether this or that fact alone would render it the duty of the Court to pronounce for a separation, but whether all the facts combined ought to lead to that result.

General ill-usage is pleaded in the 4th article, but the first specific act of cruelty charged is alleged to have taken place in June, 1842, and that on some trifling discussion as to Mrs. Saunders not endeavouring to obtain leave from some neighbours to cut certain trees, which overhung Mr. Saunders's garden. It is alleged that, upon this occasion, Mr. Saunders seized his wife by her clothes, and violently dragged her about the room ; that, in consequence, she fainted away, and was found in that condition and carried to bed.

It is manifest from this pleading, no witness being vouched, and no witness being adverted to, that direct evidence of personal violence on that occasion was not to be expected, for no person is alleged to have been present at the actual moment of ill-usage. Mr. John Alexander Saunders, the son, aged twenty at the time of his examination, is the first witness. He deposes to finding his mother in the state described, and to upbraiding his father with ill-conduct towards his mother. Mr. Saunders's observation, as detailed by this witness, is no admission of personal ill-usage ; he answered that "it was only an exhibition of her temper." Mr. William Saunders, the brother of the preceding witness, was only sixteen years of age when examined, and consequently he could not have been more than between twelve and thirteen years of age at the time when that occurrence took place. He confirms his brother's statement, and, indeed, goes beyond it ; for he states that his father said, "I only gave her a little push." This, however, would be an admission, to some extent at least, of actual violence ; but, looking at the lapse of time, and to the youth of the witness, it would, I think, be too dangerous to confide in his statement as precisely accurate. Mr. James Miller Saunders, another son, who was at the time of his examination of the age of seventeen, is also examined to

the same transaction. He confirms his brothers generally, though he does not speak to the particular expression deposed to by the preceding witness.

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I am not prepared to say that the evidence adduced on the 5th article establishes any legal act of cruelty ; but when I find the facts distinctly proved, that the screams of Mrs. Saunders were heard ; that she was found in a fainting and helpless state ; that Mr. Saunders then treated her with utter indifference—for such is the tenor of the whole evidence—I am of opinion that these facts strengthen the probability of other evidence to acts of misconduct, and for this reason : that the descent from utter indifference to the feelings and sufferings of a wife to acts of violence towards her is only one step in the same path.

This occurrence, it would appear, led to the circumstances pleaded in the 6th article. Mrs. Saunders, in the summer of 1842, paid a visit to her father in Scotland, and then complained to him of the ill-usage she had experienced from her husband. Mr. Miller, the father, very properly remonstrated with Mr. Saunders on such imputed misconduct, and which he described in fitting terms. That imputed misconduct was not denied by Mr. Saunders. Mr. Miller says in his evidence that Mr. Saunders virtually admitted it, for he did not attempt to deny having done towards his wife that with which he was charged by Mr. Miller ; but he did attempt to palliate his conduct. Mr. Miller went the length of threatening legal proceedings, and producing Mr. Saunders's own mother as a witness against him.

I apprehend that this is very strong evidence of gross misconduct on the part of Mr. Saunders, though, perhaps, not direct proof of the article. In cases of this kind, where it is often, and must often be, impossible to produce evidence of what occurred between husband and wife, such admissions, whether in words or by the absence of denial, in cases where every innocent man would deny with indignation if he could, are important evidence, for it is the best and most credible testimony the *res gestæ* would admit of.

The 7th article relates to the dismissal of a servant, named Eliza Mayhew. Mrs. Saunders, the mother of Mr. Saun-

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ders, is the only witness who deposes to the facts. She states, in that year, Mr. Saunders desired her to use her influence with the wife to have this servant taken back; that she refused, in consequence of what Mrs. Saunders had said respecting the servant; that, upon this, Mr. Saunders was very despondent about it. That is the substance of the whole of her evidence, and I apprehend that no inference important to the decision of the cause can be drawn from it.

The 8th article pleads that Mr. Saunders frequently declared that it was his wish and object to drive Mrs. Saunders from his house, and then it pleads in detail many expressions used by him with a view to induce her to quit. Mary Ramsay, who was a servant living in the house, is a witness examined on this article; and I see no reason why I should not give credit to her; and, if believed, she proves this article distinctly. She is confirmed by William Saunders, whose memory, when speaking to transactions of this time, is more to be trusted than when he speaks to those of earlier date. In still stronger terms Mr. James Miller Saunders deposes to similar declarations.

I deem this evidence to be of weight in such a case as this. It proves the *animus* by which Mr. Saunders was governed in his conduct towards his wife. When once it is established as a fact that a husband is desirous of compelling his wife to quit his roof, it is not very likely that he will be over-scrupulous in the adoption of means to attain that end. Where such a motive exists, and is proved to exist by the declarations of the husband himself, conduct corresponding to it will seldom be found wanting.

The 9th article relates to the conduct of Mr. Saunders during the year 1845, and prior to November in that year. It charges the use of most opprobrious language, the infliction of personal violence, and finally the gross outrage of spitting in his wife's face. Mary Ramsay deposes to one act only, but that is an act of personal violence, though not of an aggravated description. I use that expression because the evidence is too loose to allow me with safety to affix to it a stronger character. She deposes to Mr. Saunders push-

ing his wife out of the room, and to very unfeeling expressions then made use of by him. The evidence of the two brothers, William and James Miller Saunders, upon that article, remains to be considered; and if I am to give it credit, its effect must be very important as to the issue of the cause. As I have already observed, I fear that it is too true that near relations, when examined in any case, even though they may bear the same relationship to both parties, are very apt, though often, perhaps, unintentionally, to be imbued with the spirit of partisanship. Nor is this to be wondered at in this case, for they have often been mixed up more than mere spectators in the transactions they are about to narrate. Still, however, I accord with the opinion expressed by Sir John Nicholl, that such witnesses are to be believed as to facts, unless satisfactorily contradicted or otherwise discredited; but with respect to general descriptions or matters of opinion, some allowance must be made where the evidence is given under a state of excited feeling.

Mr. William Saunders speaks to the use of epithets which, coming from a husband to a wife, are most insulting. I do not think it necessary that I should detail that evidence, because its character is apparent upon the bare perusal of it. It is perfectly true that, at the end of his cross-examination, he, to a certain extent, qualifies this evidence; but how? These are his words: "Whilst I have been under examination, I have considered more carefully as to whether I ever heard my father call my mother a liar, as I have deposed positively to having done, and I am anxious to qualify such deposition, for though I verily believe I have heard him apply such epithet to her, I am not sufficiently clear on the point to swear positively that I have done so." Now I think that that qualification, though it may tend to throw some doubt upon the testimony of the witness, his positive testimony as to the expression which I have particularized as having been used, does induce me to repose, on the whole, greater confidence in his testimony, because it shews me that his evidence was given with care and caution, and under a strong sense of the responsibility to speak the truth. He deposes to an act of personal violence which can scarcely be

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distinguished from a blow, and which Mr. Saunders himself admits. I say, scarcely to be distinguished, because it is a very nice distinction indeed which can draw the line between a push and a blow, when administered by a husband to a wife.

With respect to a second act, spoken to by Mr. William Saunders, I cannot, from his evidence, safely conclude that any actual personal violence took place on that occasion. Mr. James Miller Saunders deposes to the use of the most disgraceful expressions which language could well convey towards this unfortunate lady—to gross personal insults; and all this was done in the presence of her children. It is impossible to describe conduct more offensive to the wife, or more entirely at variance with the obligations of the marriage vow.

The 10th article contains a charge of misconduct such as, if well founded, deserves to be characterized in terms of the severest reprehension. After detailing some dispute about the settling of money matters, it pleads that Mr. Saunders spat in his wife's face; that he afterwards, in the presence of his own children, repeated this unmanly act, and with expressions of insult towards her.

First, as to the truth of this charge. All these facts are distinctly deposed to by Mr. James Miller Saunders. I see no reason whatever for not giving him entire credit as to this part of his evidence. The Counsel for Mr. Saunders did not, and, as I think, very prudently, attempt to deny the fact; and I have thought it my duty on the present occasion to do that which I very seldom do indeed, when Counsel have not read them; I have referred to the Answers of the party, for the purpose of strengthening my own conviction: and the fact is admitted, with an attempt at palliation.

Legal effect
of spitting in
the wife's face.

Then what is the legal consequence of such conduct as this? Lord Stowell declares it to be legal cruelty, and some discussion has arisen on this fact, as to whether or not Lord Stowell was strictly correct, in reference to a report in Hetley,* in which that very question had been a matter of

* *Cloborn's Case*, Hetley's Rep. 149.

discussion in a Court of Common Law. What matters it what is said in a report of a case in Hetley on that subject? What more competent judge on such a question is there, or could there be, than Lord Stowell? or what authority higher or more obligatory upon me to respect and follow? I would follow the authority of Lord Stowell upon such a question, even if the reported case in Hetley, or in any other report, had been in direct opposition to it; for such a question belongs to the Ecclesiastical jurisdiction, and does not appertain to that of Common Law Courts. But, in truth, I cannot think that the expression of Lord Stowell requires any authority whatever to support it. It is, I think, a natural and inevitable conclusion from the atrocity of the act itself. Is it not manifest, that so gross and personal an insult would be insufferable even in the lowest ranks of life? How much more criminal, how much more painful to the feelings of the injured wife, when such an offence is perpetrated between parties accustomed to the decencies of society, and educated to have a higher regard for them! But to look at such behaviour, if it were necessary so to do, even with more technical strictness, is it possible to believe that, when a husband has proved himself so utterly insensible to all the feelings which he ought to entertain towards his wife, so brutal and so unmanly, that he would, when his passion was excited, restrain himself within the bounds of the law, and that his wife would be safe under his control? Threats of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to any threat, for it proves a malignity of feeling, which would require only an opportunity to manifest itself in acts involving, in all probability, greater personal danger, but never surpassing it in cowardly baseness. Nor are such consequences less to be feared when it is proved, as it is in this case, that the husband supposed, though vainly supposed, that he was not within the cognizance of the law; for those who are resolved to go to the edge of the law are the most likely to overstep the bounds which their fear, but not their sense of duty, prescribes to them.

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I have no occasion to say what would be the effect of such an act if taken singly ; but I have no hesitation in declaring my opinion, that, united with the other circumstances proved in this case, there is enough to require the Court to interfere for the protection of the wife, and to pronounce for a separation ; unless, indeed, there remained behind some facts which could take off from the legal effect of those to which I have already adverted.

I shall very briefly dispose of the remainder of this case. The evidence of Miss Saunders, the sister of the husband, upon the 15th article, I will not read,—it is unnecessary to do so ; but is it possible to read that evidence and not conclude, with Miss Saunders herself, that the removal of Mrs. Saunders from her husband's house was necessary for her personal safety ? Miss Saunders, being the sister of Mr. Saunders, was the last person who it was likely would take part unjustly with the wife against her own brother. Though Mr. Saunders, on that occasion (in the month of November, 1845), used no actual personal violence, yet his conduct was so outrageous as to render it indispensably requisite, in the opinion of Miss Saunders,—herself a witness and a bystander,—that she and the sons of Mrs. Saunders should sit up during the night for the protection of this unfortunate lady ; and she, the sister of Mr. Saunders, is the person who “very strenuously,” as she says, urged the departure of Mrs. Saunders from the roof of her husband, for the sake of her personal safety.

Now with respect to this most disgraceful scene, deposed to, as I have said, by Miss Saunders, it is not left to her evidence alone ; she is corroborated by William Saunders, and his evidence goes further, with reference to prior conduct, practised by Mr. Saunders against his wife, for Mr. Saunders, denying other acts of violence, admits he had, on one occasion, slapped his wife's face. It is singular to observe how, fortunately for the cause of justice, when a person endeavours to evade that justice by what he thinks extraordinary caution, it often happens that he is unable to shape his conduct with accuracy and precision to the attainment of his end, and that when he thinks he is advancing

his own end by his own declarations, fortunately makes that known which enables the Court to administer the justice it desired to do. The same observation applies to the evidence of Mr. James Miller Saunders.

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It appears that, after this transaction, Mrs. Saunders took refuge in the house of Mr. Saunders' own mother, who, infinitely to her credit, afforded her daughter-in-law the most fitting asylum.

Now, against all this, what has been urged by way of defence? First, it has been said that there were, on some occasions, witnesses present who have not been examined, and the name of Eliza Mayhew has been mentioned; but I am yet to learn that it is incumbent on the wife to produce all possible witnesses, without regard to their characters or circumstances, or why the obligation on Mr. Saunders to produce witnesses, if he think they can avail him, is to be altogether dispensed with, and the burden thrown upon the wife. She is called upon to produce as many witnesses as she deems sufficient to establish her case; she may fail from the paucity of her witnesses, as well as from their evidence; but if they make out a *prima facie* case against the husband, it is for him to produce other witnesses in whom he can confide to establish his defence to the charges alleged against him. As to Eliza Mayhew, as she had been discharged, under the circumstances stated, by Mrs. Saunders herself, she was clearly not a witness whom the Court would have expected Mrs. Saunders to examine.

But it is said that Mrs. Saunders withdrew herself from her husband's bed, and I confess I do not wonder at it. It may be enough to observe that this case affords no sufficient proof of the fact; that it is neither proved in evidence nor set up in plea. But even if the fact were established, that Mrs. Saunders had occasionally withdrawn herself from her husband's bed, such conduct on the part of Mrs. Saunders, though, if done without good cause, it would be reprehensible, would be no justification of the cruelty and insult practised by Mr. Saunders towards his wife, and could not take away from the legal effect of such cruelty and insult.

The wife's
alleged with-
drawal from her
husband's bed.

With respect to the correspondence, it in no degree alters

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my opinion as to the conduct of Mr. Saunders, or of what ought to be the result in this cause. Affectionate letters from a wife to a husband are not necessarily inconsistent with cruelty on his part. They may be so, but are not necessarily so. So long as the parties dwell together, it would be folly to suppose that the letters of a prudent and affectionate wife should teem with complaints of past misconduct, and the reiteration of all the quarrels which had taken place between them, and, by the exacerbation of her husband's angry feelings, defeat the object nearest her own heart, namely, an entire reconciliation, and the securing her better treatment. The letters Nos. 8 and 9, annexed to Mr. Saunders' Allegation, only prove what is proved throughout the cause, that Mrs. Saunders was an attached and devoted wife, most reluctant, until absolute necessity compelled her, to live apart from her husband. All her letters reflect credit upon her character, and, if the feelings of Mr. Saunders are not wholly extinguished, must strongly remind him of the happiness he has thrown away by his own misconduct. I pronounce for the separation.

Separation pronounced for.

Proctors :—*Nelson*, for the wife; *Burchett*, for the husband.

Divorce by reason of cruelty, by the husband against the wife;—suit not sustained through a deficiency of evidence.

FURLONGER v. FURLONGER.—*Cause*.—This was a suit for a divorce by reason of cruelty brought by the husband, Frederic Furlonger, against Sophia his wife. The parties were married in London, 16th March, 1840, he being a bachelor and she a spinster, and cohabited until September, 1845, one child, a daughter, aged six years, being the issue of the marriage. The Libel pleaded that, shortly after the marriage, the wife exhibited an ungovernable temper and disposition, and on several occasions, whilst living at Warminster, in 1841 and 1842, conducted herself towards her husband, without provocation on his part, in a most violent manner, and constantly made use of coarse and offensive language towards him (calling him thief, drunken whoremaster, scoundrel, and villain), in the presence of his servants and others, in consequence of which, he, in August,

1842, separated himself from her; that, in the autumn of 1842, he went to reside at Yeovil, where he was joined by his wife, whom he had consented to receive in consequence of her apparent contrition, and promises not to repeat her misconduct, which, however, she renewed in an aggravated degree, and in December, 1842, she threw a kettle full of boiling water at her husband, who with difficulty avoided the same, and she then threw over him a bowl of water, in which some dirty linen was soaking preparatory to its being washed, and struck him violently with a brass candlestick on his head, which it cut and bruised; that, in April, 1843, the husband having gone to the theatre with a neighbour, she locked him out of his house on his return at night, and, the inns being closed, he was compelled to pass the night, which was rainy, in the street, and she kept him locked out of his house for about a week afterwards, defeating all his attempts to gain admission, placing with her own hand, at dusk, a deep washing-tub, full of water, to catch him as he descended, if, as he had before attempted to do, he had scaled the back wall of the premises, assailing him, when he applied for admittance, in coarse, offensive, and threatening language, in consequence whereof he quitted Yeovil, and his wife, with her child, took up her abode at her father's house, at Totton, near Southampton, the parties living separate for about two years; that, in March, 1845, the husband went to Clifton, where his wife was then staying, and had an interview with her (wishing to see his child), which led to a renewal of their cohabitation at Marlborough, and afterwards at Settle, in Yorkshire; that, at Settle, she resumed her habits of violence towards her husband, and in July, 1845, struck him in the face with her clenched fist, so as to bruise and blacken greatly one of his eyes, and afterwards, in the night of the same day, threw a wash-hand basin-full of water over him when he was in bed, accompanying the whole with gross abuse and menaces; that, in August, 1845, she threw a can of water over him, and on another occasion, tore the skin off his face with her nails, and struck him over the arm with an iron candlestick with so much violence as to break the candlestick in two, and

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afterwards, at night, whilst they were in bed together, struck him on the face, which she also tore with her nails; that in the night following (1st September, 1845), whilst he was in bed and fast asleep, she, without any apparent cause or reason, seized him by his shirt-collar, and tried to strangle him, also tearing his face with her nails, and pulling out his hair by handfuls; that he thereupon, about midnight, quitted the house, and took refuge in a neighbour's, and from and after that night, finding his health impaired by her continued and increasing violence, he ceased to cohabit with his wife.

An appearance was given on the part of the wife, who, however, offered no opposition to the suit.

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Addams, for the husband.—Without pretending to say that the case is proved to the extent it was thought it might have been (Mr. Clapham, at whose house the parties resided at Settle, having died in March, 1846, before he could be examined), it is submitted that, there being no opposition on the part of the wife, the evidence is sufficient to found a sentence. There is only one reported case precisely similar, that of *Kirkman v. Kirkman*,* the principles of which apply to this case. No defence being set up, considering the limited means of the husband (an attorney's clerk), the Court will be justified in interposing in a case where the violence with which the wife conducts herself shews that, as in *Kirkman v. Kirkman*, she is "not mistress of her own passions;" and Lord Stowell there observed that "the persons of both parties must be protected from violence;" that "words of menace, if accompanied with probability of bodily violence, will be sufficient," and that "the suffering party is not obliged to continue in cohabitation under such treatment."

Cur. adv. vult. PER CURIAM.—I will consider till next Court-day what can do.

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 JUDGMENT.

DR. LUSHINGTON.—This is a suit brought by the husband against his wife on the ground of cruelty alleged to

* 1 Hagg. C. R. 409.

have been practised towards him by her. Such suits are of rare occurrence, as, indeed, must naturally be expected; but there is no doubt, both on principle and precedent, that they may be brought, and carried to a successful issue, if the facts proved are sufficient.

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With respect to the principles which govern these Courts in examining cases of this kind, I apprehend that, generally speaking, that would be cruelty if practised by a wife towards her husband, which would be held to be cruelty if done by him towards her. I say, generally speaking; for I think there must be some distinctions, necessarily founded on the great difference between the sexes, and the power of the husband, in ordinary circumstances, to protect himself from his wife's violence. Still, the same great rule, of danger to life or limb, must prevail: in these, as in other cases of the same *genus*, necessary protection is the foundation of all separation. In the case of *Kirkman v. Kirkman*, there was ample proof of the most stringent facts, and all Lord Stowell's observations must be taken in conjunction with the facts of that case, and with reference thereto.

Principles applicable to the case.

The parties in this case were married in March, 1840; there was issue of the marriage one child. From April, 1843, to March, 1845, it is pleaded that they lived separate. They had done so for a short time at an antecedent period. In September, 1845, they finally parted. The acts complained of are said to have occurred at Warminster, at Yeovil, and near Settle, in Yorkshire. The facts pleaded I need not recapitulate; there can be no question that they are sufficiently stringent to entitle Mr. Furlonger to the remedy he prays, if they are sufficiently proved: the only question is as to the adequacy of the proof. I said at the hearing, and I have seen no reason to depart from that opinion,—and I have again read all the evidence over,—that the case appears to me to be a *bond fide* case, brought *bond fide* by the husband; but that conviction in my mind will not supply the place of sufficient evidence: there must be proof of the facts, or at least of a sufficient part of them.

The first witness I shall refer to is Mrs. Raymond, who resided next door to the parties at Yeovil—there is no evi-

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dence as to any of the antecedent facts. The whole extent of her evidence is, that Mr. Furlonger was locked out of his house at Yeovil, and from the facts, it may be safely concluded that this was the act of his wife. But her evidence leaves the Court wholly destitute of all knowledge of the circumstances which it would be most material for me to know, in deciding upon a question of cruelty. It would be difficult for me to say that the locking her husband out of the house on two or three or four occasions can be invested with the character of personal cruelty; for I find throughout all her evidence that there is no proof of personal violence. She saw none, and the mere declaration of the husband, not proved to have been made *recenti facto*, without other evidence of probability, will not suffice. Declarations of parties, if made *recenti facto*, we all know, are admitted, under particular circumstances, as evidence of facts, and from the very necessity of the case; but in all such cases, there are some preliminary facts connected with the charge, and the declaration is mixed up with the *res geste*.

There is another witness, Mr. Cogan; but his evidence does not carry this part of the case further: in fact, he speaks to declarations of the husband only. He proves that Mr. Furlonger was locked out of his house, and that on one occasion he got in; but here ends his evidence: and this is all the evidence as to what occurred at Yeovil.

I now proceed to consider what is proved to have taken place at Settle, in Yorkshire. Mrs. Margaret Gifford is examined in support of the facts pleaded to have taken place at Settle and its vicinity; but she proves nothing. She, indeed, saw Mr. Furlonger with his face bleeding, and he sought refuge at her house; but she does not in any way, even by the declarations of Mr. Furlonger, connect Mrs. Furlonger with any of these acts. I have no lawful means of drawing such an inference. I might, perhaps, have an impression upon my mind, as an individual; but, as a judge, I should not be doing my duty if I were to form any conclusion but upon evidence upon which I can rely.

Hannah Clapham is the daughter of the person with whom the parties last lodged. On the 8th article, she

deposes that Mrs. Furlonger used very abusive language towards her husband ; but she negatives the use of personal violence in her sight. And here, again, I cannot go the length of concluding that the blow, if blow it was, which caused the eyes of Mr. Furlonger to be blackened, was the act of the wife ; because all she says is that Mr. Furlonger came down one morning with one of his eyes blackened, and that when he had gone up to bed, the night before, it was not black. There is no declaration that it was the act of his wife. Her strongest evidence is on the 11th article ; but even that is very unsatisfactory. There had been a struggle between the parties, and, according to Mr. Furlonger's account, his wife had attempted to throw a pitcher of water on him, and he had turned it on herself. His face was scratched, and he said his wife had done it ; but if I were in a situation to say that I could implicitly rely upon this witness, as to this fact, there is a total want of that proof which is indispensable to enable the Court to come to a judicial conclusion that the wife committed an act of violence on this occasion without provocation. Here are no preliminary, no explanatory circumstances, such as I have always found to exist in all cases of cruelty which it has been my lot to be acquainted with.

Edmund Winder deposes to the very deplorable condition in which Mr. Furlonger was on the 1st of September ; his face scratched and bleeding, and his hair torn out by the roots ; and if this condition had been connected with any act of Mrs. Furlonger, it would have been a fact of considerable importance, and have laid a foundation for the Court's sentence. But what is the fact ? He swears expressly that he does not know how or by whom Mr. Furlonger sustained these injuries. If the witness does not know, sure I am that I cannot supply this deficiency by mere inference from his not returning to his wife, or because Mr. Winder swears he was afraid to do so.

I am under the necessity of saying that the evidence in this case is not sufficient in law to justify me in pronouncing a Decree in Mr. Furlonger's favour, and my judgment must, therefore, be that he has failed in proving his Libel. The

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Not sufficient
to sustain the
Libel.

my clothes that are made up, to my maid,
 I desire my dear daughter to be my sole

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is on the second side or page, the rest
 (third) being blank. On the next
 than one-third) being blank, is
 signed by the said Catherine
 in presence of us at the same time,
 in presence of each other, have
 been witnesses.

Catherine Willis,
 Camden House,
 Brighton."

se,
 Brighton.
 e Weaver,
 Camden House,
 Brighton."

The Allegation propounding this paper pleaded the Allegation.
 making and due execution of the same on the 4th March,
 1847; that, when the will was produced and shewn to the
 subscribed witnesses, for the purpose of being attested by
 them, the deceased covered, or attempted to cover (though
 ineffectually), with a piece of paper, the attestation-clause
 above her signature; that the third side, on which the
 attestation-clause was written, was the only part of the
 paper seen by the witnesses; that, immediately after the
 execution, and after the witnesses had left the room, the
 deceased inclosed the will in an envelope (produced), and
 wrapped them both up in a handkerchief in which she had
 been in the habit of keeping her writing utensils, and which
 handkerchief was placed by her daughter (party in the
 cause), by the deceased's direction, in a drawer in the bed-
 room of the deceased, where they were found after her
 death; that the whole of the will is in the deceased's hand-
 writing; that, on the 17th February, 1835, the deceased
 executed a will and duplicate, one part of which she took
 into her own possession, and the other remained with the
 solicitor who prepared the same; that, for several days
 prior to the execution of the will propounded, the deceased
 was engaged in burning papers of various kinds, and after

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Court may feel regret, from the impression upon its own mind as to the real merits of this case, that such should be the conclusion to which it has come; but I am well satisfied that I am only discharging my duty by requiring the *quantum* of proof which has always been required by other judges in cases of this nature, and by never allowing myself to be led away, by an anxiety to relieve a hardship upon an individual, to do what might cause an infinitely greater injustice to the interests of the public at large. I must pronounce against the separation.

Proctors:—*Middleton*, for the husband; *Fenton*, for the wife.

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A holograph will, signed by the testatrix at the foot of the attestation-clause, which was written on the third side of the sheet of paper, the will ending on the second side, a considerable space intervening, at the bottom of the second and top of the third sides:—Held not to be signed at the foot or end, within the Statute.

WILLIS v. LOWE.—Allegation.—This was a case of proving the will of Catherine Willis, widow, by Catherine Willis, spinster, her daughter, and the sole executrix named therein, against Mr. John William Lowe, one of the executors named in a former will, dated 17th February, 1835.

The will of 1835 was very formally drawn, with a very full attestation-clause. The instrument in question, written on a sheet of letter-paper, and undated, is headed "Codicil," and begins, "I, the undersigned Catherine Willis, &c., having made my last will and testament, bearing date the 17th day of February, 1835, I do now by this writing in my own hand make as a codicil to revoke the said will bearing date the 17th day of February, 1835." She then proceeds to bequeath the bulk of her property to her daughter, and, after some trifling bequests, concludes: "All my goods and chattles not directed, to my daughter, Catherine Willis, and desire her to be my residuary legatee. My lace, pieces of silk, and made up veils, to my daughter, Catherine Willis."

rine Willis; my clothes that are made up, to my maid, Mary Stradwick. I desire my dear daughter to be my sole executrix." JUNE 25.
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The paper here ends on the second side or page, the rest of the page (about one-third) being blank. On the next page, the upper part (less than one-third) being blank, is written: "Signed and declared by the said Catherine Willis, the testatrix, at the presence of us at the same time, who at her request, in the presence of each other, have subscribed our names as witnesses.

" Ann Butcher,
Camden House,
Brighton.

Catherine Willis,
Camden House,
Brighton."

Charlotte Weaver,
Camden House,
Brighton."

The Allegation propounding this paper pleaded the Allegation making and due execution of the same on the 4th March, 1847; that, when the will was produced and shewn to the subscribed witnesses, for the purpose of being attested by them, the deceased covered, or attempted to cover (though ineffectually), with a piece of paper, the attestation-clause above her signature; that the third side, on which the attestation-clause was written, was the only part of the paper seen by the witnesses; that, immediately after the execution, and after the witnesses had left the room, the deceased inclosed the will in an envelope (produced), and wrapped them both up in a handkerchief in which she had been in the habit of keeping her writing utensils, and which handkerchief was placed by her daughter (party in the cause), by the deceased's direction, in a drawer in the bedroom of the deceased, where they were found after her death; that the whole of the will is in the deceased's handwriting; that, on the 17th February, 1835, the deceased executed a will and duplicate, one part of which she took into her own possession, and the other remained with the solicitor who prepared the same; that, for several days prior to the execution of the will propounded, the deceased was engaged in burning papers of various kinds, and after

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A Motion for probate of the paper had been made and rejected by the Court, founded upon an affidavit of the attesting witnesses, who deposed that they were in the service of the deceased, who, on the 4th March, 1847, informed one of them (Weaver), that she wished her and her fellow deponent to come and witness her handwriting; that, in the afternoon of that day, they attended in the room of the deceased, who produced the paper, and signed her name thereto, at the end of what they now perceived to be the attestation-clause, written on the third side, but which, at the time of her signing her name, she covered, or attempted to cover, with a piece of paper, but not so effectually as to prevent their seeing that there were some lines of writing above her signature; that the deceased so signed her name in the joint presence of the deponents, and they, thereupon, by the desire of the deceased, who told them that it was all correct, and that they need not be afraid to sign the paper, subscribed their names, in the presence of the deceased, who particularly informed them they were not to go away until they had both signed the paper in her presence; and they further deposed that, at the time the deceased so signed the paper, it was folded up so that the side on which the attestation-clause is written was the only part of the paper seen by the deponents.

The admission of this Allegation was opposed.

ARGUMENT.

Addams, Dr., in opposition to the Allegation.—The paper, though called a codicil, is in fact a will, revoking the former will of 1835, and disposing of the whole property; and the question is, whether, supposing all the facts pleaded could be established, the Court could pronounce for such a document. For any thing that appears in the plea, the body of the paper, at the time the witnesses subscribed the attestation-clause, might have been a blank, and the whole of the first and second sides written afterwards, and the question is, whether the Court can admit a plea so framed; for if this be a good execution of a will, every body may dispense with the formalities of the Act, which must

become a dead letter. There is another difficulty. There is a considerable interval between the conclusion of the will and the attestation-clause and signatures. There is plenty of room for the attestation-clause on the second side, and it is not written at the commencement of the third side. If such a paper could be admitted, the Act may be evaded by merely signing a paper in blank, and obtaining the subscription of witnesses, filling up the other part of the paper *ad libitum* at any time.

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Deane, Dr., on the same side.—The first question is, what is the intention of the 9th clause of the Act, and the meaning of the words “foot or end,” and “shall attest” the signature of the testator? I contend that the meaning of “foot or end” is not anywhere after the conclusion of the will, but the nearest possible place after it where there is room; and the witnesses must attest the signature of the deceased to the will when affixed to it at that nearest place. The Court has, on Motion, giving way to the equity of the Statute, put a looser interpretation upon the words “foot or end;” but the effect of those cases is considerably weakened by a recent decision of the Court in *Ayres v. Ayres*,* which is a case on all fours with this.

Sir J. Dodson, Q.A., in support of the Allegation.—As the presumption of the law is that the former will was destroyed by the deceased, the question is between this paper and an intestacy. Though called a codicil, it is, in fact, an independent will. The signature is at the foot or end of the will, as it follows immediately the attestation-clause. There was certainly a possibility of writing that clause nearer the body of the will; but the Act does not require that a will should be written as closely together as possible, and some persons write with long intervals. [PER CURIAM.—There is a long space at the bottom of the second side and at the top of the third, and no reason is assigned why so great a blank should be left, affording room for a considerable addition to the will. What evidence is there that, when she produced the paper, she had written any part of

* *Ante*, p. 375.

JUNE 25. the will? She covered every part but her own signature.]
Willis v. Lowe. The very attempt to conceal affords a presumption that something had been written which she wished to conceal. It is not necessary that a party should declare, "This is my will." The Act requires not that the *will* should be witnessed, but the *signature*, which must be made or acknowledged. [PER CURIAM.—And the witnesses are to attest and subscribe—what? The *will*.] It is not necessary that the witnesses should know it is a will. [PER CURIAM.—They must know what they attest.] Then they must read the will [PER CURIAM.—No; I should be satisfied if they knew what they attested. Have these witnesses subscribed the *will*? They have subscribed the attestation-clause.] The Court has held that, if the witnesses saw the signature, it would be sufficient. *Keigwin v. Keigwin*.^{*} *Re Ward*.† *Holt v. Genge*.‡ It would be a dangerous doctrine that the witnesses are required to see the whole of a will. [PER CURIAM.—I do not wish that they should be required to see the whole will, but that they should know what they attest. If the attestation-clause seen was at the bottom or end of the will, I should be satisfied, as the presumption would be in favour of the will being there at the time; now, the presumption is the other way. If you can shew that the rest of the paper was written at the time, that would be sufficient; but this is no attestation of the will. If I were to judge from the appearance of the paper, I should say that the bequest of the clothes to the daughter and the servant, and the appointment of the executrix, were written after the will was executed, from the different ink and writing. It would not do for the Court to rest its decision upon this ground; but that is the appearance, certainly.] The paper disposes of the whole property, and there is not much room for other matter.

Jenner, Dr., on the same side.—This is one of the most important questions which have arisen under the Act. The doctrine contended for would revoke almost every probate

^{*} 3 Curt. 607.

† 2 Curt. 334.

‡ 3 Curt. 160. 1 Notes of Ca. 572. 4 Moo. P. C. C. 265.

granted, except of instruments made by a solicitor. In common practice, the attesting witnesses are the only persons examined, and they usually know the will, because their handwriting is to it. If a will consists of many sheets of paper, each must be identified, otherwise the Court will have no *constat* as to any of the sheets but the last written, which is commonly the only one seen. The will may have been written at different times, which would account for the difference of the writing and in the colour of the ink. The construction contended for is straining the Statute. [PER CURIAM.—What is the foot or end of the will ?] It is difficult to say. [PER CURIAM.—The deceased wrote the attestation-clause on the third side of the paper—why ?] Because she did not wish the witnesses to see the former part.

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SIR H. JENNER FUST.—It is quite impossible for the Court to hold that this is a due execution, according to the provisions of the Statute. The will is written upon two sides, the first and second, of a sheet of letter-paper, and the conclusion is about two-thirds down the second side; then there is a blank to the bottom of the second side, and room for two or three lines at the top of the third side; then there are the attestation-clause, in the deceased's handwriting, the signatures of the witnesses, and the signature of the deceased at the bottom of the attestation-clause. When the witnesses subscribed the paper, they only saw the third side, and the deceased endeavoured to conceal the attestation-clause as far as she could, though she did not do it effectually; but *what* they saw is not stated. They attested, *as is said*, the deceased's signature—her signature to what? Not her signature at the foot or end of the will, but at the end of the attestation-clause: there is no signature at the foot or end of the will. There is room certainly for the attestation-clause on the second side. It is quite impossible to hold that this signature is at the foot or end of the will.

Cases have occurred, before the real purpose of the Act had been sufficiently ascertained, in which the Court has given a construction to the Statute as far as possible to fulfil the Purpose of the Act.

JUNE 25. real intentions of parties ; but the Court is under the necessity of looking to the clear intention of the Act. The Court was of opinion at first that the intention of this part of the Act was to remove a difficulty which had arisen under the Statute of Frauds, by the construction of which a signature at the commencement of a will was equally good with a signature at the end. Now, it is required that the signature should be at the foot or end. But there was another reason for the provision, namely, to guard against fraud. The Act requires that the signature should be at the foot or end, to prevent any addition to the will being made after the deceased had executed it in the presence of witnesses. What is the case here ? There is room on the second side, and also on the third side, for a large addition to the will. It is true, the whole of the property is disposed of ; there is a bequest of the residue, and the appointment of an executrix ; and I have no doubt that it was the deceased's intention to give the bulk of her property to her daughter for the care and attention she had shewn towards her during her illness ; but I cannot, therefore, pronounce for the validity of a will not executed in conformity with the provisions of the Act.

I do not adopt the proposition of Dr. Deane, that the signature must be in the nearest possible place after the conclusion of the will : it is not necessary to consider that proposition now, though it may be hereafter. But no reason is assigned for writing the attestation-clause on the third side, and leaving so large an interval between it and the conclusion of the will. I do not say that, if the attestation-clause had followed immediately after the conclusion of the will, it would not have been sufficient, nor do I mean to lay down any rule for other cases ; all I do in this case is to hold that the deceased has not complied with the requisites of the Statute, by signing the will at the foot or end, and the witnesses cannot give the Court any information as to the reason why she did not sign on the second side of the paper. I do not say that it is necessary for the witnesses to have seen every part of the will ; but they must give some information to the Court to shew that the will was finished and completed when they attested it. Here they can give no

information that the will was shewn to them in a complete and finished state. I am of opinion that, if the facts pleaded in the Allegation were proved, they would not enable the Court to pronounce for the validity of the will.

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If the duplicate of the former will was destroyed by the deceased (as alleged) by burning, that would not be necessarily a revocation of the paper, because it might be done with the intention of substituting another, which intention was not carried into effect. However, I am of opinion that the Court must reject this Allegation; and if the other paper is to be propounded, it must be in a different cause from the present. It is clear what were the intentions of the deceased, but it is quite impossible for the Court to hold that she has duly executed the will whereby she meant to carry those intentions into effect. Of course, I direct the costs to be paid out of the estate.

Allegation rejected.

Proctors:—*F. H. Dyke*, for the propounder of the will; *Jellicoe*, for the executor of the former will.

Judicial Committee of the Privy Council.

JUNE 29.

PHILLIPS v. PHILLIPS.—*Appeal.—Cause.*—This was an appeal from the Arches Court of Canterbury,* which had affirmed the judgment of the Consistory Court of London,† in a suit for divorce by reason of adultery brought by Mr. Revell Phillips against Anne his wife, who met the suit by charging connivance on the part of the husband. Both Courts pronounced for the divorce; from which sentence the wife appealed to this Court.

Addams, Dr., in support of the Appeal.—The Chancellor of London held that, in order to bar the husband, there must have been corrupt connivance on his part, and the Appellate

Connivance, plea of, by the wife, in bar to a suit by the husband for a divorce by reason of her adultery,—not sustained,—judgment of the Court below, for the divorce, being affirmed.
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ARGUMENT.

* 4 Notes of Ca. 523.

† 3 Notes of Ca. 414.

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Court assented to this doctrine. If *corrupt* connivance be absolutely necessary, I agree that the husband is entitled to a separation; but I submit that this is not the correct conclusion to be drawn from the case of *Moorson v. Moorson*.* [LORD CAMPBELL.—Is this a case of more than gross negligence, at most? Is it a case of guilty knowledge?] Gross negligence may amount to guilty knowledge. Lord Stowell, in *Moorson v. Moorson*, says: "If a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit; he must be supposed to see and mean the consequences." The husband in this case must have seen and meant the consequences. [LORD CAMPBELL.—Dr. Lushington defines what he considers corrupt connivance: "knowledge, or presumed knowledge, of the adultery, or of improper familiarities leading to it." LORD BROUGHAM.—Connivance is shutting your eyes to the light; not shutting your eyes in the dark.] In *Crewe v. Crewe*,† the doctrine is laid down very clearly. [MR. PEMBERTON LEIGH.—Has there been any discovery of adultery since the suit?] None. [LORD CAMPBELL.—What strikes me is the want of motive on the part of the husband to connive.] He was fond of his wife; she leaves him at last, not he her.

Peacock, on the same side.—His wife's conduct before the inquiry should have made Mr. Phillips more vigilant. "Guilty she was not to be deemed," Dr. Lushington says; "very indiscreet she had been, and Mr. Phillips knew it." [LORD BROUGHAM.—You must take with it this—that Mr. Phillips was very fond of her, and not anxious to open his eyes. It is a very humiliating thing to ask a servant questions reflecting upon his wife's honour. He abstains till his suspicions are almost confirmed.] When a wife absents herself from her home, staying out all night, and, when her husband asks her where she has been sleeping, refuses to tell him, surely he should say, "Until you satisfy me where you have been, I will not sleep with you any more." By not so acting, the presumption is against him, that he must

* 3 Hagg. E. R. 105.

† *Ibid.* 131.

have known the adultery of his wife, or gave her facilities to commit the crime; and if so, he is not entitled to a divorce. If a husband, placing unlimited confidence in his wife, suffers her to act in this manner, the presumption is against him that he facilitated her misconduct. [LORD CAMPBELL.—Oh, no. MR. PEMBERTON LEIGH.—The husband, in this case, has had no opportunity of giving an explanation of the facts from which connivance is inferred.] The question is, whether Mr. Phillips has met the requisites stated by Dr. Lushington in admitting the Libel:* “He is bound to shew that, either from the pressing duties of his profession, or from the circumstances of concealment by which the transactions were attended, and the ingenuity with which we know such intercourse is often carried on, he had no good ground to believe that his wife was guilty of adultery; that he has not acquiesced in her offence, and has not continued to cohabit with her after the fact came to his notice, or rather after it ought to have come to his notice.” This was notice to Mr. Phillips to get rid of the presumptions against him, and if he neglects to rebut them, it is his own fault. Counsel for the husband stopped.

JUNE 29.

Phillips v. Phillips.

June 29.

LORD LANGDALE, M.R. — Their Lordships think, after JUDGMENT. bearing the case of the Appellant, that they are in a situation to come to a conclusion without any further argument.

This is a suit for a divorce by reason of adultery by the husband against the wife, commenced in the Consistory Court of London, afterwards brought before the Arches Court, and from thence here. The defence to the suit is, not a denial of the fact of adultery, but that the husband connived at it. The single question upon which this Court has to come to a conclusion is, whether the husband did or did not connive at the adultery of his wife.

Their Lordships concur entirely in the statement of the law as laid down by Dr. Lushington, and afterwards by Sir Herbert Jenner Fust. I understand that, in order to esta-

The doctrine of the law.

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blish and make out the plea of what is called connivance, there must be proof, either by direct evidence, or by evidence of facts which would justify a legal presumption, that a husband charged with conniving at his wife's adultery knew the fact: that any thing which falls short of that, amounting only to negligence, is not connivance. Negligence there has been in this case of a very extraordinary nature, which cannot be better characterized than it was by Dr. Lushington, at the first hearing of this case: "Of most culpable negligence I cannot acquit Mr. Phillips; of the most supine inertness in what concerned his own house, the happiness of his wife, the comfort of his children, the peace and sacredness of his domestic hearth,—of the most culpable and supine inertness, in these respects, I cannot acquit him." And no doubt it is impossible, from the circumstances stated in the evidence, to acquit him; and if there had been any proof of knowledge on his part of the adultery, the plea in defence, on the part of the wife, would have been established. But the learned judge says, in the same judgment: "To constitute connivance, I think, the cases go the length of establishing that there must be actual knowledge, that is, proof of knowledge, or irresistible presumption of knowledge, of the adultery, or of the improper familiarity."

Now the question here is, whether there is proof of that knowledge. The knowledge is not attempted to be proved by direct evidence; but is there any legal presumption of that knowledge from the facts before us? That there had been impropriety in the conduct of Mrs. Phillips previous to 1840 is sufficiently proved; it created so much suspicion as to lead to an inquiry into her conduct, which was conducted by two gentlemen, Mr. Preston and Mr. Granger, and the result is thus stated by them:—"We have seen the various persons sent to us to be examined: nothing we could learn criminated Mrs. Phillips. You are fully aware of all the facts of the case, and we think, if it is your wish by Mrs. Phillips's returning to her home, she may, from the misery she has endured and caused you, alter her conduct entirely, and become a pattern to all of us. Our conviction is, that Mrs. Phillips is innocent." Therefore, Mr.

Phillips might reasonably have supposed that, whatever impropriety there might have been in the conduct of Mrs. Phillips, it would be amended: accordingly, he took her home.

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Now what would be the effect of this investigation? Although she had been imprudent in her conduct, she had not been criminal. Mr. Phillips had accused her of having been criminal, or of having afforded ground for suspicion that she had been criminal, and he was convinced of his error. The gentlemen who investigated her conduct certified that, at that time, she was innocent. They proposed that some female friend should reside with her; but whether this was suggested to him or not, Mr. Phillips did not carry the suggestion into effect. But there was not the smallest ground of suspicion against Mrs. Phillips during the year 1840. There is one circumstance proved of no small importance as to the fact of Mrs. Phillips's adultery—namely, that she was delivered of a child; that she had the child carried to Kensington Gardens, where she met Mr. Ranney, and that she said it was Mr. Ranney's child. But there is not the least hint given by anybody that this came to the knowledge of Mr. Phillips.

In 1841, circumstances are proved which shew great impropriety on the part of the wife, and neglect on the part of the husband: she was in the habit of staying out, not without his knowledge, to a late hour at night, and sometimes all night; the servants were not kept up, but Mr. Phillips sat up, and opened the door to let her in. These are circumstances sufficient to shew the culpable negligence of this gentleman as regarded himself, his wife, and his family. But, again, there is nothing to shew that he knew his wife was seeking opportunities to commit adultery with Mr. Ranney.

No proof of
the husband's
knowledge.

Looking at the conclusion which the two learned judges below have come to, their Lordships, if they felt a doubt, would rather incline to agree in those judgments than to come to an opposite conclusion upon grounds which appear to them altogether unsatisfactory. The case being so, and the Counsel for the Appellant not having suggested any

Sentence
affirmed.

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sufficient reason for coming to a different conclusion, so far as the evidence goes, their Lordships will feel it to be their duty to recommend to her Majesty to affirm the judgment of the Arches Court.

LORD BROUGHAM.—Observe: we give no judicial opinion as to Mr. Phillips's conduct, not having heard his Counsel, who might have given an explanation of it. With reference to the words cited from Dr. Lushington's judgment, supposing there had been no appeal, Mr. Phillips would have stood in the same position.*

Proctors:—*Toller*, for the Appellant; *Toller*, for the Respondent.

Prerogative Court of Canterbury.

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Domicil.—A testatrix, born at Smyrna, of Dutch or Russian parents there residing, under the protection of the Dutch Consulate at Smyrna, married to a British subject, and, after his death, continuing to reside during the remainder of her life in the Levant, makes a will, disposing of property in England, in the English form:—Held, that

GOUT v. ZIMMERMANN.—*Act on Petition*.—This was originally a cause of proving the will of Marian, otherwise Marie Anne, Duveluz, late of Smyrna, widow, promoted by Mr. Peter Ralph Gout, one of the children of Mary Gout, widow, a legatee named in the will (and as such one of the residuary legatees), against Mr. John William May, the Attorney of Mr. Johan Jacob Zimmermann, the brother and only next of kin of the deceased. The will had been transmitted from Smyrna to the Home Office, and brought into the Registry by the Queen's Proctor; and being propounded by the legatee, it was opposed on behalf of the next of kin, who prayed to be heard on his Petition, on the ground that the deceased was, at the time of her death, a domiciled native of Holland. An Act on Petition was accordingly entered into, in which it was alleged, on the part of the

* The Committee consisted of Lord Brougham, Lord Langdale (M.R.), Lord Campbell, and Mr. Pemberton Leigh.

next of kin, that the deceased was the daughter of Dr. Zimmermann and Annetto Tusti, his wife, and was born at Smyrna, 5th May, 1774, where Dr. Zimmermann, originally a native of Holland, had, for some time previously to the birth of his daughter, resided, under the protection of the Dutch Consulate, and continued so to do until his death; that the deceased was baptized in the Dutch Protestant Chapel at Smyrna, and intermarried with Pietro Duveluz, a native of Switzerland, who, until his death in 1832, continued to reside with his wife at Smyrna, or elsewhere in the Levant; that, after his death, the deceased continued to reside at Smyrna until her own death, on the 19th March, 1845, and that she was not, at the time of the execution of the will, an English subject, nor amenable to the laws of England, but a subject of Holland, and entitled to all the rights and privileges of a Dutch subject, and the validity of her will ought to be determined by the law of Holland.

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her British domicile acquired by marriage had not been changed, nor had her domicile of birth reverted, and the protest to the jurisdiction of the Court overruled.

The Answer to the Act alleged that the deceased's husband, Peter Emanuel Duveluz, was a native of England, and by birth a British subject, the son of David Samuel Henry Duveluz, a native of Switzerland, and of Sarah Lee, an Englishwoman, who were married at Manchester, in the county of Lancaster, in 1768, and that D. S. H. Duveluz had, long prior to such marriage, carried on the business of a merchant in Size Lane, Bucklersbury, and was in the year 1759 naturalized by Act of Parliament (33 Geo. 2, c. 19); that P. E. Duveluz, his son, was born in Size Lane, in February, 1771, and baptized according to the rites and ceremonies of the Church of England, and for several years afterwards continued to reside with his parents in Size Lane; that, in 1797, P. E. Duveluz and the deceased (then Marian Zimmermann, spinster) were married at Smyrna, according to the rites and ceremonies of the Church of England, by a minister of that Church, and, about 1808, they left Smyrna and came to England, where they were domiciled, and continued permanently to reside until 1818, in which year the deceased's husband was appointed British Consul at Adrianople, whereupon, and by reason solely thereof, he

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left England with his wife, and resided in that place (except for short intervals of absence), in his official capacity as British Consul, until his death in 1832, whereupon his widow resided for various periods at different places in the Levant, without acquiring any property or any fixed permanent residence at any of such places; that, ever after her marriage, until her death, she considered herself, and was reputed to be, a British subject, and constantly attended the service of the Church of England; that she frequently declared her expectation and intention that her property, after her death, should pass by the law of England, and that she should make an English will, and gave instructions to the Rev. B. Lewis, then officiating as chaplain to the British congregation at Smyrna, to prepare her will, and agreeably thereto, he wrote her will, dated 19th March, 1845, which she executed according to the forms of the English law; that, agreeably to her own express desire, she was buried in the English Burial-ground at Smyrna, Mr. Lewis reading the Burial Service of the Church of England on the occasion; that, after her death, her property was treated and considered by the British and Turkish authorities, and all others (including her brother, J. J. Zimmermann), at Smyrna, as the property of a British subject, and as passing under the will; that, in April, 1845, her brother, being a Dutch subject, by means of the Dutch Consul at Smyrna, caused the British Consul there to institute a formal and official investigation respecting the circumstances attending the execution of the will, which accordingly took place before the British Consul, Mr. Zimmermann being in person or by his agent present thereat, and heard in the matter, and he and the Dutch Consul admitted that the decedent was properly treated and considered as a British and not a Dutch subject; wherefore, the question as to the validity of her will ought to be determined by the law of England. It was further alleged that the whole of her property (except some articles of small value) consisted of £950 Stock in the Three per Cents, which had been purchased by her husband whilst at Adrianople, and £460 in the hands of Messrs. Heath and Co., of London, arising from the accumulation of dividends

on the stock, and from an annuity to which she was entitled under the will of her husband's father.

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It was subsequently admitted, on behalf of the next of kin, that the father of the deceased's husband did intermarry with Sarah Lee, at Manchester, in 1768.

It also appeared in proof, and was admitted by the legatee, that the father of the deceased was a native, not of Holland, but of Riga, in Livonia, and an objection was raised at the hearing that the original plea, alleging that the deceased was a native of Holland, was thereby negatived. On the other hand, it was argued that the substantial question was, whether the validity of the will was or was not to be decided by the law of England. THE COURT overruled the objection, holding that it did not go to the merits of the case, and that it would be doing an act of injustice to stop the case upon this ground.

Bayford, Dr., for the next of kin.—It is not contended that, ARGUMENT. the husband of the deceased being an Englishman, she did not, after marriage, become a domiciled Englishwoman: the question arises as to her character after her husband's death. Her domicil of origin then reverted to her; this is easily done, less being required to recover the domicil of birth than to acquire a new domicil. "*Le Virginia*."* The fact of continued residence abroad is strong evidence in this case. She had no communication with England, except to draw money thence, not placed there by herself, which she allowed to remain there in the hands of trustees. The facts suffice to shew that she did revert to her domicil of origin.

Harding, Dr., for the legatee.—It is difficult to know the issue to be tried, or for what the other side contend. Because the deceased was born in Smyrna, and, after the death of her husband, lived and died there, therefore was she a domiciled Dutchwoman? What is the meaning of the phrase in the Act, "under the protection of the Dutch Consulate?" Is there any thing in the *Jus Gentium* to shew that living under the Dutch Consul's protection at Smyrna will make a person a Dutch subject? In Sir C. Robinson's

* 5 Rob. 99.

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Reports,* there is a Certificate from the Secretary of the Dutch Levant Traders, concerning the Dutch Consuls at Smyrna, which states that "there is no Dutch factory at Smyrna," and that "the Dutch establishment at Smyrna is not restricted to Dutch subjects: subjects of other powers are admitted therein, and have liberty to become members of the Dutch establishment, but must submit to pay the Dutch Consulate for support of the Consuls, &c., and to take an oath to observe and perform all regulations." Reference is also made to the state of the Dutch establishment in Turkey in the case of the "*Twee vrienden*."† Because Mr. Zimmermann swears that the deceased died at Smyrna under the protection of the Dutch Consulate, it does not follow that, *jure gentium*, she was a domiciled Dutch woman. There are neither facts nor authorities to shew that she is to be considered otherwise than a domiciled English subject, which she became by marriage. *Maltass v. Maltass*.‡ *Collier v. Rivaz*.§

Bayford, on the authorities.—In *Maltass v. Maltass*, the question of domicil was not decided, as in either case the British law applied. [PER CURIAM.—When did the Dutch domicil first attach, and when was it resumed? Where is the proof that, after her husband's death, the deceased abandoned the domicil acquired by her marriage, *animo et facto*? Her father was born in Livonia, and she at Smyrna, where she lived until her marriage, when she became a domiciled British subject. I cannot find any fact shewing her change of domicil beyond her living under the protection of the Dutch Consulate—what is the effect of that?] The Certificate quoted applies to that point: "it is at the option of such individuals to put themselves under which Consul they please, and withdraw from him to go to another."

JUDGMENT.

The facts.

SIR H. JENNER FUST.—This question appears to me to lie in a very narrow compass, and certainly the issue to be tried by the Court lies in a still narrower compass. The facts

* 3 Rob. Appendix, No. I. p. 9.

† 3 Curt. 231. S.C. 2 Notes of Ca. 33.

‡ 3 Notes of Ca. 257.

§ 3 Rob. 29.

1 Robert. 67. &c.

§ 2 Curt. 855.

supported by evidence, are these:—The deceased died in 1845. She left a will, in the English form, made by a gentleman who was acting as British Chaplain at Smyrna, disposing of property in England,—I believe she had no property elsewhere. An appearance was given on behalf of her brother, her next of kin, who alleged that she was a domiciled native of Holland; whereas it turns out that she was not a native of Holland,—that is, she was born in Smyrna, of a Dutch family, but her father was born at Riga, in Livonia, having been resident, for some time before the birth of his daughter (in 1774), at Smyrna, as stated in the Act on Petition, “under the protection of the Dutch Consulate:” what is the meaning of these words does not exactly appear. He continued to reside at Smyrna until his death, and whatever character he bore, whether he was a subject of Russia, of Sweden, of Smyrna, or of Holland, the deceased’s domicile would, of course, follow his, so long as she continued in his family and resided with him. In 1798, she married a gentleman who was born in England, but whose father was a native of Switzerland, and who became a naturalized British subject; and whatever might have been the previous domicile of the deceased, in 1798 her domicile merged in that of her husband, and from 1798 until his death in 1832, she became and continued to be a domiciled British subject to all intents and purposes; for although he went to reside at Adrianople, as Consul and to carry on trade, he retained his British character: the merely becoming Consul in another country does not change the domicile of the person who exercises that office. So that, in 1832, the deceased was to all intents and purposes a domiciled British subject. What did she do to acquire another domicile? Is it shewn that at any time she put off her British and obtained a Dutch domicile? Although it is said that she resided under the protection of the Dutch Consulate at Smyrna, I do not know that this would have wrought a change in her domicile. What did she do? Upon her husband’s death, she does not continue to reside at Adrianople, or at Smyrna, but she goes about to various places in the Turkish dominions; and it is not stated that she settled or located herself either at Smyrna or

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at any other of those places; it is only said that, up to the time of her death, "she resided under the protection of the Dutch Consulate at Smyrna." A great deal has been said about her attachment to the Dutch Lutheran Church; but she received the rites of the Church of England, and had recourse to Mr. Lewis, an English minister of that Church at Smyrna, who officiated as chaplain to the British congregation there, to administer to her the rites of that Church at her own house, and therefore nothing arises out of this which marks any intended change of domicile. Are there any other circumstances? In the affidavit of Mr. Zimmermann it is stated "that the deceased took up her fixed abode at Smyrna in the year 1832, making occasional excursions in the Levant; that the deceased, as well as her father and the deponent, having been baptized according to the rites of the Lutheran Evangelical Church, and always following the same, have always regarded the English Episcopal Church or other Evangelical Church in the same light with their own in all essentials, and frequented without distinction the one or the other Church, in default of the existence of their own; that the deceased was married according to the rites of the Lutheran Church, and by a Lutheran minister, and after the death of her husband frequented neither the English nor any other Church, but received the Sacrament in her own house." I cannot, I confess, consider that this affidavit contains any thing indicating a change of domicile beyond the fact of her residence abroad. Beyond that I do not see any thing to fix her with any domicile but that which she acquired from her husband, and especially a Dutch domicile. The only statement is, that she lived under the protection of the Dutch Consulate, and that is not sufficient to affix to her a Dutch domicile. I am of opinion that the Dutch domicile is not established. Whether she was a Turkish subject or a British subject is immaterial to the present question, as the question raised by Mr. Zimmermann is, whether she was not a Dutch subject, and could therefore make a will only according to the law of Holland, and the Court is asked to pronounce that the question as to the validity of this will

Dutch domicile not established.

ought to be determined by that law. I am of opinion that, according to the facts, the deceased is not proved to have died a domiciled subject of Holland, and bound, in the disposition of her property by will, to govern herself according to the law of Holland, but that, *prima facie*, she is entitled to be considered a British subject, having become so by marriage, and having done no act whereby she divested herself of the character she acquired by her marriage, and that she is not proved to have been at the time of her death a Dutch subject: and that is the whole question for the Court to determine. I think the deceased was not a Dutch subject, and the Court will not suspend the proceedings until the validity of the will shall be determined by a foreign Court, but will inquire into its validity, if opposed by the other side. Upon these grounds, I reject the Petition.

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Gout v.
Zimmermann.

Petition re-
jected.

With regard to the question of costs, the Court might have been disposed not to accompany its decision by a condemnation in the costs, but that it is quite clear that the course pursued on the part of the next of kin was an erroneous one. It is a protest against the jurisdiction of the Court, and if that protest be overruled, as a matter of course, I am bound to give the other party the costs of Costs. trying the question. I therefore reject the Petition, and condemn the party in the costs.

Proctors:—*Abbot*, for the legatee; *Jenner*, for the next of kin.

WARD v. LAMBERT AND CLARK.—*Allegation*.—This was A conditional will, executed as the same stood at the time of execution, without certain additions afterwards made therein; promoted by Ann Ward, a spinster, a cousin germane, and one of the next of kin, of the deceased, and a principal legatee named in the will, against George Jackson Lambert, another cousin germane and also one of the next of kin, and Charles Thomas Clark, a party cited to see the will propounded, but who did not appear. The paper was propounded in an Allegation which

will, executed by the deceased, with a blank space above her signature, which was filled up from her dictation the succeeding day, but she died without re-executing the will,

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*Ward v.**Lambert.*

—held not to
be signed at the
foot or end.

pleaded that the deceased died 9th May, 1846, aged 73, leaving personal property of the value of about £1,000; that, on the 6th May, 1846, the deceased, who then resided in a boarding and lodging house, at Edwinstow, Notts, being ill, sent for T. R., a friend, and upon his going to her, informed him of her wish and intention to make her will, and that he (T. R.) and C. C. should be her executors, and desired that her will should be made for her by Mr. H., of Newark, a solicitor, but that she wanted to save the expense of his coming to Edwinstow, provided her will could be made by him without his so doing; that, after some further conversation, the deceased determined that T. R. should at once take down her wishes in writing and send a copy to Mr. H., to learn whether he could make a proper will from it, without coming to Edwinstow; that T. R. thereupon proceeded to write, from the deceased's dictation, the will propounded, contained on three pages or sides of a small sheet of note-paper, namely, the whole of the first page (save some words afterwards added), and eight lines, comprising certain legacies, on the second page; that, after the paper had been so far completed (the contents having, in the course of writing, been read to and approved by the deceased), several persons came into the room, whereby further progress being interrupted, T. R. said he would see the deceased upon the subject again the next morning, but that he considered it advisable that she should then execute the paper as her will, in case any thing should occur to prevent the same being more formally prepared and executed, and with the approbation of the deceased, he wrote upon the third page of the paper (leaving a blank at the bottom of the second and at the top of the third sides) the words: "This is my last will and testament in case I do not get it more properly executed;" that, immediately after, the deceased executed the paper, which was duly attested; that, in the morning of the following day, T. R. again called upon the deceased, who expressed a desire to give further instructions to Mr. H. for preparing her will, and T. R. then, from the dictation of the deceased, wrote such further instructions upon the lower half of the second page of the paper exe-

cuted the evening before (including the appointment of two executors), and also upon the upper part of the third page, and made certain alterations and additions in the first and second pages, no other person being present with the deceased at such time but himself; that, in the after part of the same day (the 7th), the deceased became greatly reduced in health and strength, and wholly incapable of conversing on matters of business, in consequence whereof T. R. omitted to send any instructions to Mr. H. to prepare a will for the deceased to supersede that she had already executed, and she died early in the morning of the 9th May, without re-executing, or being able to re-execute, the will after the additions and alterations so made therein.

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Haggard, Dr., in opposition to the Allegation.—The ARGUMENT. question is, whether it can be maintained that this will was signed at the foot or end. In the case of *Willis v. Lowe*,* the last Court-day, the Court held that an Allegation, propounding a paper of a very similar kind, was inadmissible, the paper not being signed at the foot or end.

Curteis, Dr., in support of the Allegation.—There is barely room at the bottom of the second page to finish the will; there was not space to sign. [PER CURIAM.—Why not? Seven lines have been added on that side of the paper. It is manifest that the deceased desired to make an addition in the space left.] If it ever was a good will, it is a good will now. It was suggested to her that she might sign the paper as her will conditionally, and she signed it on the third side. [PER CURIAM.—With a space between it and the ending of the writing, and an addition is actually made there after she had signed her name. I think you can hardly hope to succeed after the case of *Willis v. Lowe*, the last Court-day.] In that case the witnesses did not see the will, or even the attestation-clause; here all was known to the party who witnessed it.

SIR H. JENNER FUST.—In this case, although the signature is on the third side of the sheet, there was ample space

* *Ante*, p. 428.

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*Ward v.**Lambert.*

for attestation-clause and signatures on the second side, for seven lines have been added there after the paper was signed; and it is clear that the space was left in order that the deceased might make an addition to the will, and she signed on the third side to admit of the addition. It is one of the very cases which the Act was intended to provide against.

Allegation re-
jected.

I reject the Allegation, and direct the costs to be paid out of the estate.

(With consent, a joint administration was decreed.)

Proctors:—*Engleheart*, for Ward; *Brickwood*, for Lambert.

High Court of Admiralty.

JULY 14.

Collision.—**THE "MELLONA."**—*Cause, by Plea and Proof.*—This was a cause of damage by collision by the owner of the brig *George*, of 108 tons, with a crew of eight men, from Newcastle to Cowes, against the schooner *Mellona*, of 106 tons, from Shields to Guernsey, which came in contact in the Cockle-gat, on the night of the 5th March, 1845, both vessels being coal-laden.

Where the place was one in which there was a chance of meeting with other ships, the weather was thick and the night dark, with snow falling, the master of one of the vessels which came in contact having left the deck at the moment to two seamen; such vessel held to be responsible for the collision, on the ground of want of a sufficient look-out, there

The Libel pleaded that, on the evening of that day, the approach of night rendering her course through the Cockle-gat dangerous, the *George* (with other vessels) was tacked off the land, in order to go well outside of the Newarp Sand; that, about 10 o'clock P.M., the wind blowing strong from the E.N.E., the weather being thick and hazy, the snow falling, and the night dark, the brig being close hauled on the starboard tack, about four or five minutes prior to the collision, and when off the Newarp Light, which bore S, about four or five miles distant, the schooner *Mellona* was

l nearing the *George* on the larboard tack ; that she repeatedly hailed, but no attention was paid to such , and the schooner, continuing her course, struck the with her larboard bow on her larboard side, at which master of the *Mellona* was not on deck ; that so great damage done to the brig that it was apprehended it would immediately sink, and she became unmanageable, at three o'clock A.M. of the next day, whilst passing the Cockle towards Yarmouth Roads, she got upon her Sand, and was totally lost, the master and two crew being drowned ; and that the damage and loss of the brig were occasioned solely by the fault, mismanagement and want of skill and of a proper look-out of those on board the schooner.

Responsive Allegation counterpleaded the material facts in the Libel, alleged that the *George* was a very small vessel, and attributed the collision to inevitable accident through the darkness of the night.

Court was assisted by Trinity Masters.*

Dodson, Q.A., and *Bayford*, Dr., for the *George* ; and *Robinson*, Drs., for the *Mellona*.

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Mellona.

being a possibility, had a better look-out been kept, that the collision might have been prevented. — A party, in such a case, cannot plead inevitable accident, but is liable for the consequences which, by possibility, he might have prevented. Inevitable accident is that which no skill and no vigilance could possibly have avoided.

LUSHINGTON (*addressing the Trinity Masters*). — SUMMING UP.
 Men : The primary object of the present investigation is to ascertain whether the collision of these two vessels arose from the misconduct of either, or whether it was the result of an inevitable accident. By "inevitable accident" I mean an accident which no skill, no care, no caution which could reasonably be expected, might have prevented. The second question to be asked is, whether, presuming that the collision was occasioned by any default of those on board the *Mellona*, the damage to the *George* arose in consequence of that collision, or whether it was occasioned by the entire unskilfulness and improper management of the master, who perished : for it is greatly to be desired, that, on the present occasion, not only has a loss of property been caused by this collision, but also of three

* Captain Ellerby and Captain Farrer.

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Mellona.

Delay on the
part of the
plaintiff.

Before I proceed to state some of the considerations upon which, as I apprehend, your judgment must be founded, I must for a moment beg your pardon for alluding to some of the observations of Counsel upon a point which does not concern you—I mean with respect to the delay that has taken place in this case. I have on many previous occasions expressed an opinion to this effect—that I have no right to refuse to entertain a suit commenced by a party alleging himself to be aggrieved, provided it is brought within the time limited by law; but if I saw any unreasonable or improper delay, then, in all cases where the proof was not sufficiently clear to enable the mind of the Court to come to a satisfactory decision, undoubtedly there would be a degree of presumption against the party who had delayed the proceedings, because, in consequence of that delay, valuable evidence might have been lost. On the present occasion, the collision took place so far back as March, 1845, and no proceedings were commenced until March, 1846, so that there was an interval of twelve months, a period much less than would be required to enable the Court to say that it cannot entertain the suit. When these proceedings came under the cognizance of the Court, it was affirmed by the owners of the *Mellona* that there had been unnecessary delay, and they alleged many facts to induce the Court to come to that conclusion. I thought it my duty to reject that part of the plea, and for this obvious reason: it must necessarily have led to a reply, which would have occasioned considerable expense, if not delay. Another reason that operated on my mind was, that the owners of the *Mellona* reside at Guernsey, and it is well known that it was utterly impossible to proceed against them personally unless they consented to give an appearance, and it is stated that they refused. But, after all, there is nothing to shew that there has been any loss of evidence, for we have the evidence of all the parties who could be examined; and I see no reason to suspect that their memories are unfaithful, or that they have given their testimony in any respect wilfully untrue, for their depositions seem fairly given.

The facts.

It appears that both vessels were coal-laden, and, accord-

ing to the statement of the master of the *Mellona*, he was at the time keeping his reach on the larboard tack, for the purpose of getting out of the Gat, the wind blowing strong from the E.N.E., the *George* being on the starboard tack. We now come to a fact which, in my view of the case, is of the greatest importance, namely, what was the state of both these vessels just at the moment preceding the collision, with regard to their respective crews, and with respect to the weather? To take the weather first; I conceive the true result of the evidence, subject to your better judgment, to be this, that it was an exceedingly dark, stormy, dirty night; that during the night there were frequent snow-storms, which rendered it extremely difficult to see any object except when almost in immediate proximity. As to snow, I think the preponderance of the evidence is, that snow was falling; but I cannot come to a satisfactory conclusion as to whether it was absolutely a snow-storm, or whether snow was merely falling. But the night was so dark, and the difficulty of seeing was so great, that if there was no negligence on either side, the collision would be attributable to inevitable accident.

So much as to the state of the weather; now for the conduct of those on board the *Mellona*—for there is no imputation upon those on board the *George*, so far as any thing was done immediately preceding the collision. In the Protest made by the master of the *Mellona*, he states that the weather was so thick that he could not discern any object, though he had one man on the look-out as well as himself, and that, all of a sudden, the *George* was on their starboard bow. Although these Protests are frequently drawn up with much less care and attention than the case requires, yet I can hardly think that in a matter of this great importance the attention of the master was not drawn to the fact as to whether he was at the time keeping a look-out or not; and I regret, therefore, to find that his evidence in the Protest is so discrepant from that which I am now about to read, given on oath. He says: "At about eleven o'clock of the said night, the schooner was still lying out south-east; just at that moment, I stepped down in the cabin, to look at my

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chart. Up to that moment I had been on deck the whole evening, keeping a look-out forward with Christopher Wilson, one of the men. At that moment it was so thick and dark, that no object was discernible at so great a distance as half a ship's length off; you could not, in fact, from the schooner's deck, have seen her jibboom-end. I knew nothing of the collision until the two vessels struck. I felt the jerk of the concussion, and I thereupon flew on deck instantly." It is quite obvious that, according to this statement of the master himself, he was below; and it is equally obvious that he cannot speak with certainty as to the cause of the collision, the state of the weather at that precise moment, or to any thing else.

The look-out.

Now we come to this question: whether, under all the circumstances of the case, a proper look-out was kept on board the *Mellona*; and if not, what are the legal consequences to be drawn from such a state of things? It appears that the *Mellona* had a crew, including the master, of six persons; that it was the mate's watch, and the master and two of the crew were on deck—one at the helm, and the other two keeping a look-out, the mate and the rest of the crew being below. The very description given by the persons on board the *Mellona* as to the state of the weather and character of the night, and the number of vessels lying in that vicinity,—all these circumstances rendered it peculiarly incumbent on the master of the *Mellona* to exercise the greatest possible vigilance to avoid running the risk of any accident. Now, it distinctly appears that there was one man on the look-out, and that the master was below, and it will be for you to advise me, with your nautical experience, considering the state of the night, the strength of the crew, and the proximity of other vessels, whether it was not the absolute duty of the master, if he found it necessary to go and consult his chart, to call somebody up to supply his place. The worse the night, the greater the cause for vigilance; and though we may be told that no care, no caution, could enable them to descry a vessel not in immediate contact, yet I submit to your judgment that the greater the necessity was, so far from abandoning the attempt as impossible, the

Should be vigilant in proportion to the exigency.

greater ought to have been the care and vigilance employed. The counter-argument would go to this; that in the thickest fog, because you cannot see to the extent you require, you should desert the deck of the vessel.

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I will now proceed to the second branch of the case, namely, with regard to the very important consideration of the actual cause of the loss of the vessel. Assuming for a moment that the collision took place, not in consequence of inevitable accident, but in consequence of any blame attachable to the *Mellona*, then I am of opinion that, in all cases of this description, where blame attaches to one vessel and the other is lost, the presumption is *prima facie* that the vessel was lost in consequence of such collision. It would be all but impossible in these cases, where the vessel did not go down immediately, to enter into an investigation as to whether all the measures adopted on board the damaged ship were right, and whether, if other measures had been pursued, she might not have been saved. The presumption of law is, where one party is found to blame and the other vessel is lost, that this vessel was lost in consequence of the collision: and that I take it upon myself to say is the presumption of the law. But let us see the state of the facts; let us see whether the immediate loss of the vessel and of three lives is to be attributed to any want of skill on the part of the master of the *George*, or to any misconduct on his part. Let us read the evidence of Legg, and see whether the course pursued by the master of the *George* was an erroneous course. He says: "After some time, the mate called me forward in the brig, and with my assistance he cleared the broken jibboom of the schooner from our rigging, and the two vessels went clear of each other. By the collision the larboard bulwarks of the *George*, and several of her stanchions, were carried away; there were great holes where the stanchions had been, and her covering-board was knocked up, and her yards, rigging, and sails were all greatly injured, braces, stays, and halyards being broken in all directions. After the *George* had separated from the *Mellona*, we set her sails in the best manner we could, but every thing was so broken that we could not make much of

The actual cause of the loss of the vessel.

Presumption of law.

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Mellona.

a job of it. We tried to get into Yarmouth Roads; we were obliged to go somewhere, as the wind was dead on shore. The brig did not miss stays; we did not try to tack at all. We could not have gone upon the starboard tack without danger of sinking the brig, through the holes in her larboard side; we therefore did our best for Yarmouth Roads. It was dark and thick, and we could not see any thing. There was sand each side of us. We could not tell whether we were too far to windward, or too far to leeward. We proceeded in uncertainty till it was a little after two o'clock in the morning, as well as we could judge, of the 6th of March. We then struck the sand, and the brig began hammering and knocking about on the sand." That is his evidence on the first plea; his evidence on the second plea is to the following effect: "The brig sustained so much damage and was so disabled for sea by the collision, that, in my opinion, it would have been impossible for us to have hove to and waited for daylight. She was damaged on the larboard side, and by our putting her on the starboard tack, her wounded side would have been more under water, and we could not heave her to on the larboard tack without danger of being driven on shore. Indeed, we could not well have hove her to at all, her maintopsail yard being broken right in two; her halyards, and braces, and mainstay, and jibstay, and foretopmast backstay, and, on her larboard side, her bulwarks, stanchions, and covering-board, were all broken; every thing was flying about and useless, and we could not, in my opinion, have kept her to windward without losing the ship and all hands. As she ran before the wind, one hand was sufficient to keep the pump in her sucking." It is true, this is the evidence of one witness only; but the question is this: the presumption is, that the master of the *George* did wisely to preserve his own life and the property, not that he was guilty of negligence, want of skill, and misconduct; and it is for you to say, looking at this evidence, whether you can come to the conclusion that he was ignorant of his duty, and wilfully attempted to make Yarmouth when he ought to have hove to.

I must say a word with respect to inevitable accident, and

a good look-out. By "inevitable accident," I mean that which no skill, no vigilance, could possibly have prevented. If there be a possibility of prevention, and an absence of due skill and proper vigilance, it is impossible to say that the party was not to blame; for the greater the emergency, the more indispensable is it that those qualities should be exerted for the preservation of property. With regard to a look-out, you, infinitely better than I, know what is a competent look-out; but to my ignorant mind it does appear that the necessity of a good look-out is doubled under the circumstances that appear in the plea on behalf of the *Mellona*, because it is they who represent that it was impossible to have avoided the accident because of the darkness.

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Mellona.

I shall now put to you three questions: first, whether, Questions. considering the state of the weather, the part of the sea where the two vessels were, and the chance of meeting with other ships, the master of the *Mellona* ought to have left the deck with only two seamen there, or not? In other words, was a good look-out kept? Secondly, considering the state of the weather, if a good look-out had been kept, was there a possibility that the collision could have been avoided? Thirdly, whether there is sufficient evidence to justify the conclusion, that the *George* was subsequently lost by the ignorance or misconduct of her master?

CAPTAIN ELLERBY.—We are decidedly of opinion, first, OPINION. that there was not a sufficiently good look-out on board the *Mellona*; secondly, that, had there been an efficient look-out, there was a possibility of the collision being avoided; and, thirdly, that the subsequent loss of the *George* was not attributable to any want of skill on the part of the master and crew.

PER CURIAM.—The conclusion to which I must come in JUDGMENT. law is, that the party proceeded against must be responsible for this damage, because it is established by the opinion of the gentlemen whose assistance I am favoured with, that there was blame on the part of the *Mellona*, in not keeping a better look-out. With respect to the second proposition, I worded it very carefully. I asked them whether, if there

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Mellona.

Damage pronounced for.

had been a good look-out, there was a *possibility* that the collision might have been avoided; and the answer was, that such a possibility did exist; and I am of opinion, in point of law, that if there has been previous negligence in not keeping a good look-out, then that party is responsible for all the consequences which might, *by possibility*, have been prevented. If indeed, a party is to blame, but by no possibility whatever could injurious consequences have resulted from that culpability, then the Court might not hold him responsible; but if a party is to blame, in the manner in which it is now satisfactorily established this party was to blame, I hold that he is liable for the consequences, which, *by possibility*, he might have prevented. On the third question I never myself entertained any doubt, namely, whether the master of the *George*, either through ignorance or negligence, pursued a course which led to his own destruction. I pronounce for the damage, with costs.

I do hope and trust, that the result of this case, both as regards the loss of property and life, and the penalty, if it may be so called, which will be inflicted on the owners of the *Mellona*, may operate, in some degree, to prevent that utter recklessness which the Court every day perceives to exist amongst colliers travelling from the north. These collisions are of frequent occurrence, and the loss of property and life is necessarily increased. Those on board these vessels must not forget that they have, in many respects, a dangerous navigation, and from the multitude of vessels that now occupy that part, the danger of collision is increased infinitely beyond what it formerly was.

Proctors:—*Coote*, for the *George*; *Toller*, for the *Mellona*.

Consistory Court of London.

JULY 14.

Divorce by reason of adultery, at the suit of the husband, **TUCKER v. TUCKER.**—*Cause.*—This was a suit for a divorce by reason of adultery by the husband against the wife. The parties were married in India, in 1842 (the wife

being a native of France), and cohabited there until 1846, three children being the issue of the marriage. In that year they came together to England from Calcutta; and during the voyage an adulterous intercourse was alleged to have commenced on board the ship between Mrs. Tucker and Capt. J., and to have continued after their arrival in England. The main proof of the adultery rested upon letters written and received by Mrs. Tucker.

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Tucker v.
Tucker.

pronounced for
on the confes-
sion of the
wife, aided by
supplemental
evidence not in
itself amount-
ing to proof of
adultery.

Haggard, Dr., for the wife.—It is acknowledged that, under the Canon,* a sentence of separation cannot be pronounced founded upon the confession of the party alone: there must be supplemental evidence, and there is none in this case which merits that character. The testimony of persons on board the ship tends rather to negative adultery. There are repetitions of what is considered to be admissions on the part of the wife, who subsequently became insane.

ARGUMENT.

R. Phillimore, Dr., on the same side, cited *Noverre v. Noverre*; † *Hamerton v. Hamerton*; ‡ *Grant v. Grant*; § and *Mortimer v. Mortimer*.||

Sir J. Dodson, Q.A., for the husband, stopped by the Court.

DR. LUSHINGTON.—If I entertained any doubt whatso-
ever as to the sufficiency of the evidence in this case to estab-
lish the charge of adultery, it would be both my duty and
my inclination to avail myself of the benefit I should derive
from the arguments of Counsel; but as I cannot bring my-
self to think that there is any deficiency in the proof, either
in point of law, or morally speaking, to affect the conviction
of my own mind, I should only trouble the gentlemen who
appear for Mr. Tucker unnecessarily by hearing their argu-
ment.

JUDGMENT.

It is true, that, with regard to the Canon, which applies to
separations both *à mensâ et thoro* and *pro dirimendo matri-*
monii vinculo, the Court is bound not to pronounce a sen-
tence of separation, on a charge of adultery, upon the confes-

The Canon.

* Canon cv. of 1603.

† 4 Notes of Ca. 652.

‡ 2 Hagg. E. R. 8, 618; and 3 Vol. 1.

§ 2 Curt. 16. 7 Mo. Law Mag. 120.

|| 2 Hagg. C. R. 315.

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*Tucker v.
Tucker.*

sion of the wife or the husband alone, and for the best and plainest reason,—to guard against the possibility of imposition by confessions which may be collusive, with the consent of both parties, to obtain that separation. That is the principle upon which the Canon is founded. I accede to the rule and the principle of the Canon ; but, at the same time, I must take care that I do not stretch it beyond those bounds within which it ought fairly to be confined ; for if I were so to do, the inevitable consequence would be, that, in many instances, a really aggrieved party would be left without a remedy.

The cases.

I do not apprehend that this case falls within any case that has been cited. In *Mortimer v. Mortimer*,* I well remember the words of Lord Stowell, pressed as he was, and closely pressed, with the argument, that there was nothing against the wife except her own confession : with his usual energy, he said, “ What evidence can be more stringent, more convincing to the mind of any Judge, than a real and *bond fide* confession ? ” I do not say that I use his very words, but I am sure that I express his very meaning. Lord Stowell, neither in that case, nor in any other, laid down any rule whatsoever as to what were the circumstances which, called in aid of a confession, would be sufficient to work on the mind of the Court both a moral and legal conviction of the guilt of the party. It is true he did use the expression “ proximate acts,” because the very nature of the circumstances pleaded would naturally lead to the adoption of that expression ; but it was not used in the sense of *expressio unius, exclusio alterius* ; but it was with reference to the case itself.

The case of *Hamerton v. Hamerton*† appears founded on a different principle. There the wife had received, and was convicted—if I may use the expression—of receiving, letters from the supposed adulterer of the very strongest kind ; but it was also alleged that they had had a certain meeting, where adultery had taken place ; yet, when the evidence came before the Court, it entirely failed in proving the parties had

* 2 Hagg. C. R. 315.

† 2 Hagg. E. R. 8, 618 ; and 3 Vol. 1.

ever met on any occasion on which an act of adultery was likely to have taken place between them ; yet, there being a confession of the wife, Sir John Nicholl, with great propriety, though feeling the hardship of the case, and being morally convinced of the guilt of the wife, would not pronounce the sentence on that evidence, but gave an opportunity for the production of further evidence, which was procured from Paris, and eventually he pronounced a sentence of separation.

With respect to *Grant v. Grant*,* that is more applicable, because in that case there was some independent evidence, as to improper familiarity, and in that case the divorce was pronounced for.

With regard to the case of *Noverre v. Noverre*,† the difficulty arose from the relative position in which each of the parties was placed. The person charged as the adulterer was a very young person, apprenticed to Mr. Noverre, a surgeon. Of course, from his age, and the situation in which he was, there were constant, hourly, opportunities for the parties to meet, and as there was no direct act of indecent familiarity proved, I was under the necessity,—after great consideration,—of taking every one of the circumstances and combining them together, and, after such combination, I considered myself justified in pronouncing for the divorce.

In the present case, the first consideration is, whether there is or not a clear confession in the letters. Now I have read over the letters, and it does appear next to impossible that any person can look through these letters, addressed to Mr. Tucker, the father, and to Mr. Tucker, the husband, and not come to the most clear and undoubted conclusion that there is a confession of adultery. Taking all the letters together, that they contain a full confession of adultery with Capt. J. I entertain no doubt whatsoever.

The only other question is, what is the auxiliary evidence? Why, the first auxiliary evidence is, that the wife was ready to receive, and did receive, the letter from Capt. J. himself, dated the 29th of October, 1846. I think again,

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The confession full.

The auxiliary evidence.

* 2 Curt. 16. 7 Mo. Law Mag. 120.

† 4 Notes of Ca. 652.

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*Tucker v.
Tucker.*

nobody can peruse that letter without coming to the same conclusion, that it is an admission of improper intercourse between the parties. It is said that there is no evidence from on board the ship ; and it is to be regretted that there is this absence of evidence. At the same time, I am not prepared to say that the absence of such evidence,—not knowing whether it was easy to be procured or not,—should be fatal. But there are circumstances in this case which, to my mind, put the guilt of the party beyond all doubt. On the 5th of November, 1846, the discovery takes place, in consequence of Mr. Tucker snatching a letter from his wife's hands, and perceiving in what terms Capt. J. had addressed her. Then from the evidence I have this fact ; he takes her about the town to visit ; then, the same day, she goes down to Liverpool. Capt. J. comes with her, and takes a lodging, and there she remains with him till the next day. When I see that the immediate consequence of the discovery is, that she falls into the arms of her paramour, is it possible I can, for a single instant, doubt that a criminal intercourse had taken place between the parties ?

Another great principle, as well as that confession alone should not found a sentence of separation for adultery, is, that no one shall be bound to prove the precise time and place where the adultery occurred. In addition to this there are, from time to time, declarations, at a subsequent period, spoken to by Mrs. S. In the first instance, she qualifies her evidence, and states that Mrs. Tucker was in that state of mind that the declarations are not to be relied upon ; but afterwards, she repeated, she renewed these declarations when she was not in a disturbed state of mind. It is not a simple confession in this case ; it is confession, first, by herself ; secondly, by the receipt of letters from the paramour ; thirdly, by declarations made at a subsequent period, free from all reasonable doubt ; and combined with these confessions is the circumstance of her going to Capt. J. I think it is impossible for the Court to entertain any doubt of

Divorce pronounced for. the guilt of the wife, and I must, therefore, pronounce for the divorce.

Proctors :—*Nicholl*, for the husband ; *W. Townsend*, for the wife.

[The following case (hitherto unreported) of defective proof and inexplicit admission, may be fitly appended to the foregoing.

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JULY 27, 1836.

GROVER v. GROVER.—This was a suit for divorce by Captain Grover against his wife, by reason of adultery alleged to have been committed by her with Mons. D., at Ville d'Eu, in France, in 1834.

Grover v.
Grover.

DR. LUSHINGTON.—This case has been laboriously argued by the Counsel for Captain Grover, and the Court is inclined to admit that a case of great and grievous suspicion has been made out against Mrs. Grover. But I am not satisfied (after listening attentively to the ingenious arguments addressed to the Court in support of the proofs) that I could, without violating established principles and infringing the rules of justice, pronounce that her guilt has been established by the testimony adduced in the cause. The Court has been pressed to consider the principles laid down by Lord Stowell in *Burgess v. Burgess** as applicable to this case; but the two cases are distinguished by important circumstances, and the principles extracted from that case and applied to the present fail entirely when we look narrowly to the facts.

In the case of *Burgess v. Burgess*, there were many circumstances which, supposing they were taken separately, would not have proved to the mind of any Court the guilt of the party charged; but, on the other hand, there were distinctly proved meetings between the parties; that the wife was seen coming out of the bedroom of the gentleman, with whom she was charged with committing adultery, and a confession as direct as could be.

In his judgment in that case, Lord Stowell truly said, it was right and fit that all the circumstances should be taken together, and that, when facts are established in the cause calculated to fix upon the conduct of the parties a criminal character, to view their conduct with reference to those facts. But the learned judge never said, and never would say, that, though calculated to give a colour to facts, any combination of minor circumstances will supply the place of proof of facts.

I think in this case there is a failure of proof of necessary facts and circumstances. The case more nearly resembles that of *Hamerton v. Hamerton*,† and in that case Sir John Nicholl, Dean

* 2 Hagg. C. R. 223.

† 2 Hagg. E. R. 8, 618; and 3 vol 1.

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of the Arches, declined to pronounce the sentence prayed against the wife, and there is a considerable resemblance between the two cases; for in that case, the Court must have entertained a strong suspicion of the conduct of the wife, which was of a very culpable description. I am bound, in justice to the husband in this case, to say that the facts pleaded would, if fully proved, establish the guilt of his wife with this French gentleman. But it is my duty not to act upon suspicion only; I must look at the facts, and see if there be a sufficiency of facts proved. It would be contrary to all principles of law, as well as of justice, merely on the ground of suspicious circumstances, to infer actual guilt, unless it be proved that the parties met together, and so met that they had a convenient opportunity to carry into effect criminal intentions. If it should appear that they did so meet, and had such opportunity, I should concur in the conclusion that it could not be for any other purpose than for the gratification of their criminal desires.

Captain and Mrs. Grover went to Ville d'Eu in 1834, and stayed till 1835, and it is pleaded that, whilst there, she was accustomed to go out early in the morning, with her maid-servant, whom she quitted, and told to remain in a particular place till her return; that she proceeded alone, and meeting M. D., accompanied him to a secluded place, where they remained occasionally for three quarters of an hour, and it is alleged that on such occasions they committed adultery.

The evidence in support of the charge is first and principally that of Sarah R., and it is utterly impossible for the Court to come to a conclusion upon her testimony of the guilt of Mrs. Grover. It may be taken in combination with other circumstances; but as far as it goes itself, it fails to lead to such conclusion. Nothing can be more unjust than to infer guilt from an interview between the parties, which might be accidental, in a place of public resort, without any proof of indecent familiarities.

The next witness, Mr. C., never saw the parties together on any occasion.

This brings the case as to positive testimony into a small and narrow compass; for there are only two other witnesses, Mrs. G. D. and Le T. The first happened to be walking one day after dinner, at one o'clock, and saw from a certain position in a ravine two persons, a gentleman and a lady, but not in an improper situation; the gentleman was M. D., but the witness cannot say whether the lady was Mrs. Grover, whom she had before seen. Now, to say the least, this evidence does not in the slightest degree identify Mrs. Grover as the person in company with M. D., under the

suspicious circumstances stated, but rather the contrary; for although the witness knew the person of Mrs. Grover, she cannot undertake to say it was her. But it is said, although not proof of identity *per se*, its defect is supplied by being taken in conjunction with the evidence of Le T. But he did not see the two parties together, though he met one immediately after the other; and assuming that the occasion on which he saw them was the same of which the preceding witness speaks, it is very difficult to come to the conclusion that the lady was the same who had been seen by Mrs. G. D., whom she refuses to identify. Moreover, there are discrepancies between their testimony which are not explained to my mind, and it comes out upon an interrogatory put to one of the witnesses, that there had been a dispute between him and M. D., who had a rival establishment for baking in the town, and that the witness had offered not to appear against him for 600 francs,—a fact which detracts considerably from his credit.

It is wholly unnecessary to enter into any consideration of the adultery alleged to have been committed at the cottage of M. D., as I have no sufficient evidence of the parties being there together. If I had sufficient evidence of the parties being seen in the neighbourhood of the cottage, it might raise a question of considerable difficulty; but the evidence completely fails; unless I am to infer from the absence of the lady from her own house that she was with M. D., I have no evidence leading to such conclusion.

Another part of the case strongly relied upon is the alleged confession of the lady in the evidence of Sarah R. But there is nothing which comes from Sarah R. which goes the length of saying that Mrs. Grover admitted that she was guilty of an adulterous connection; she admitted, according to Sarah R., an improper attachment, and a correspondence with M. D., but no more. It is impossible to attach a criminal meaning to the words, "Then I am betrayed!" Betrayed in what? It might be in respect to the correspondence or secret meetings between the parties. But as to such isolated expressions, where the question of the guilt or innocence of a party depends upon them, it is the duty of the Court not to go beyond their fair construction. As to the information given by Sarah R. to Captain Grover, there is one circumstance which has not been adverted to, and not unimportant in my view, rendering it very equivocal. Sarah R. deposes that, in a conversation with Mrs. Grover, when the witness asked her what she should do if Captain Grover inquired of her, Mrs. Grover replied, "Tell him." This is open to a double construction. It may be that this lady, having willingly left her husband, was reckless of the conse-

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quences, and cared not what was communicated to her husband; or, on the other hand, she might desire to be relieved from a painful situation by disclosing the secret of her correspondence with M. D., determined to meet the consequences, whatever they might be, so that she might be relieved from that painful situation. I have not the means of drawing any correct conclusion in this matter.

It is not necessary to weigh the degree of credit due to the two witnesses, M. C. and Mad. B. Both are biassed witnesses, and the Court is disinclined to place implicit reliance upon their corroboration of other testimony; and they differ in important particulars. Even if I were to go the length of their evidence, I could not alter the judgment I am disposed to give. In the entire absence of proof of any criminal familiarities, of any indecent or improper familiarities, it is impossible to arrive at the conclusion of the party's guilt.

Looking to all the facts and circumstances of this case, I impute not any blame or culpability to the husband; but, unfortunately, if the wife has been guilty of adultery, I am of opinion there is an entire failure of proof of it, and that it is my duty to dismiss Mrs. Grover from all further observance of justice in the cause.]

In a suit of nullity of a marriage contracted in a British colony, by the husband against the wife, upon the rejection of the Libel of the husband he was allowed to institute a suit against the wife for a divorce on the ground of her adultery, without again citing the wife, who was resident in the British colony.—*CATTERALL v. CATTERALL.—Cause.*—This was a suit for a divorce by reason of adultery, brought by Mr. Joseph Catterall, residing in London, against Georgiana Ann, his wife, resident in New South Wales, where the parties were married by a Presbyterian minister, by virtue of an Act passed by the Legislature of the colony. A suit was originally brought by the husband to annul the marriage on the ground that the requisites of the Colonial Act had not been duly complied with; but the Court rejected the Libel.* The husband, thereupon, commenced the present suit for a divorce on the ground of adultery, without serving a fresh Citation upon the wife abroad. On the 20th Nov. 1845, *Addams, Dr.*, on behalf of the husband, applied to be allowed to subduct the Libel in the cause of nullity, and to bring in an Allegation or Libel in a cause of divorce. The

* 4 Notes of Ca. 222. 1 Robert. 304.

wife is now in New South Wales, where there is no Court possessed of Ecclesiastical jurisdiction. This Court has authority to engraft a suit for divorce on a suit of nullity without requiring a fresh Citation to be taken out. *Clowes v. Clowes*.*

Sir J. Dodson, Q.A., for the wife.—This Libel cannot be admitted under the circumstances. The wife is out of the country, and will have no opportunity of defending herself against this charge, and her Proctor, who was appointed in a suit of nullity, and authorized to give an appearance for her to “the said Citation,” has no authority to act for her in a cause of divorce, which is not “the said cause” mentioned in the proxy. The wife is not before the Court in this suit, and it would be unjust, after citing her for one purpose, to call upon her Proctor to defend her in another suit. In *Clowes v. Clowes*, where, the husband having failed in a suit of nullity, the wife was permitted to give in a Libel for restitution of conjugal rights, the party was upon the spot.

Addams.—The proxy of the wife is of a very singular description, and seems as if framed to meet the present case ; for it authorizes the Proctor, in case the Libel was admitted, “to confess the marriage, otherwise to contest the suit negatively ;” precisely as in a cause of divorce. No injustice will be done to Mrs. Catterall, if the Allegation is admitted, all the witnesses being in New South Wales, where she resides ; whereas a delay of twelve months will be very prejudicial to the husband.

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Catterall.

Divorce pronounced for, although the marriage had not been solemnized by a clergyman of the Church of England.

1845.
Dec. 11.
JUDGMENT.

DR. LUSHINGTON.—Certainly the question now brought under the consideration of the Court is one which could not be disposed of without some time taken to consider the point, as I have done since the last Court day.

The facts lie in a narrow compass. It was originally a The facts. suit by Mr. Joseph Catterall, formerly of New South Wales, now resident in London, against his wife Georgiana Ann Catterall, on the ground that the marriage was null and void. The Libel contained averments which were most

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carefully examined by the Court, and I was of opinion that the Libel, as it stood, did not allege sufficient grounds upon which I could declare the marriage null and void. In this state the matter stood, I having given the party leave to reform the Libel. Instead of reforming the Libel, the prayer now is, that the Court would dismiss that Libel, and allow an Allegation or a Libel to be brought in of a totally contrary tenour, alleging that the marriage is a good and valid marriage, and that the wife has been guilty of adultery; and the question I have to determine is, whether, the wife being still resident in New South Wales, I am at liberty to allow this plea to be brought in, and a new suit to be engrafted on the old suit; or whether I should refuse the prayer of the husband, and put him in such a condition that he must resort to New South Wales for the purpose of serving a new Citation on the wife, or of obtaining any other remedy in the Colonial Court.

Authorities.

There have been several cases relative to this point decided by the Superior Court, the Court of Arches; and one of those cases, recently decided, is that of *Clowes v. Clowes*,* cited by her Majesty's Advocate, who has endeavoured to draw a distinction between *Clowes v. Clowes* and the present case, which it is necessary I should consider.

Sir Herbert Jenner Fust, in that case, seemed to have been of opinion that, if the husband was before the Court in a matrimonial cause,—whatever might be the nature of the cause, whether of nullity of marriage or of divorce,—it was competent to the wife to engraft upon the original suit any other of a matrimonial nature. I am strongly inclined to look upon this decision as an authority, which I am not entitled to disregard upon this occasion.

But before I dispose of this case upon authority, I must advert to the objection made by her Majesty's Advocate, as to the injustice which might be done to the wife, because if any construction of this decision would lead practically to any injustice, I should hesitate before I adopted it, unless the circumstances of the case fully justified me in doing so.

* 2 Notes of Ca. 77.

With regard to the proxy in this case, it is certainly a proxy of a very singular description ; for it is a proxy which authorizes the Proctor for the wife, if the Libel should be admitted, to confess the marriage, and otherwise to contest the suit negatively. Now this was a suit of nullity, and if the Libel had been admitted, I cannot understand how the Proctor, in a suit of nullity, could have acted according to the tenour of the proxy. I think I must leave the proxy out of my consideration. I take it to be this,—that it was intended to be an authority given by the wife, perhaps erroneously, to her Proctor, to defend her in a suit of nullity of marriage, and I do not press it further.

But if a party is before the Court in a matrimonial suit of any description, the question is, am I to hold the party to be so utterly a stranger to the cause that, in a matrimonial suit of a different kind, wherever the party should reside, I am to put the husband to the expense of serving a fresh Citation in New South Wales, and incur the risk and danger of the death or removal of witnesses, and the entire failure of justice in the cause ? Now I should consider myself bound to expose the husband to this danger if otherwise there would be any injustice to the wife ; but the Court holds the cause in its own hands, and will not allow the suit to proceed without ample notice to the wife, so as to afford her an opportunity of cross-examining the witnesses, and the Court will require that there should be ample time to give in a defensive Allegation ; and having such power, I think, in this description of case, I protect the husband from expense, and at the same time guard the wife against injustice, if I allow the Allegation to be brought in, subject to this restriction, which I think the equity of the case requires, that the wife should have ample opportunity of defence. I shall allow the Allegation to be brought in.

I have read the Allegation, and it involves a point of first-rate importance, as to the validity of a marriage performed by a Presbyterian clergyman in New South Wales. That question will require great consideration, and if I am to give my final judgment on such a point, I shall not express my opinion without ample time for consideration. I submit

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Catterall.*Allegation
admitted.

JULY 14. *Catterall v. Catterall.* it to your determination, therefore, whether it would not be a great deal better, in such a case, if the plea were to be admitted, and the Court were to determine the question when the cause comes on for hearing. It is the first case on record in which an Ecclesiastical Court has proceeded in a cause of adultery where the parties had been married in a British colony not by a clergyman of the Church of England.

1847. **July 14.** The cause came on for hearing upon the evidence taken abroad, whence it appeared that the wife had been delivered of a child, in New South Wales, twelve months after the husband had quitted the colony and proceeded to this country ; and

Divorce pronounced for. THE COURT, holding the marriage to have been legally contracted and the adultery to be satisfactorily proved, pronounced for the divorce.

Proctors:—*Thomas*, for the husband ; *Coot*e, for the wife.

Judicial Committee of the Privy Council.

JULY 19.

Salvage. — **SHERSBY AND OTHERS v. HIBBERT AND OTHERS (THE "DUKE OF MANCHESTER").**—*Appeal.*—*Cause.*—This was an appeal from the High Court of Admiralty,* in a cause of salvage, promoted by the master, owners, and crew of the steam-tug *Copeland* (belonging to the Ship-Owners' Towing Company) against the barque *Duke of Manchester*. The facts of the case, as regards the *Copeland* (there being other salvors who had not appealed), are these:—The *Duke of Manchester*, of 369 tons, outward-bound from

Whereas steam-tug, after rendering a salvage service to a sailing-vessel in the charge of a pilot, was employed to tow the salvaged vessel to the Downs, and, whilst so tow-

* 4 Notes of Ca. 575.

London to the West Indies, with a general cargo, in charge of a pilot, on the 13th December, 1845, got upon the Goodwin Sands, midway between the North Sand Head and the Gull Light vessel, at about 3. 40 P.M.; the wind moderate; the weather hazy; the tide within an hour of low water. The larboard anchor was let go, and, according to the owners, the barque, though she struck heavily at first, lay quiet; according to the salvors, she was "beating heavily." She had thirteen feet water on the starboard, and ten feet on the larboard side. A galley, which came alongside, was sent off to Ramsgate for a steamer, and the steam-tug *Copeland*, of 100-horse power, lying at Ramsgate Hole, got under weigh, and discovered the barque about 9. 30. In about half an hour after, two hawsers and the barque's steam-chain were passed from the barque to the steamer (a service attended, according to the *Copeland*, "with the greatest difficulty and danger"), which attempted to pull her off, but the hawsers and chains parted. About 10. 30, however, the barque came off the sand, whether by the pulling and "jerking" of the *Copeland*, or by the rising of the tide, was an important point in dispute between the parties. The pilot in charge of the barque, upon her coming off the sand, hailed the *Copeland* to "go to the Downs and tow ahead;" the tug accordingly towed the barque ahead for an hour and a half. Between 12 and 1 A.M. of the 14th, the barque was suddenly hailed from the *Copeland* to "starboard her helm," which was immediately done, and she got hard aground upon the Sandwich Flats (the main shore), when it was nearly the top of high water. The owners of the *Duke of Manchester* contended that this second grounding was owing solely to the culpable negligence of those on board the *Copeland*; and it appeared that the master of one of the luggers employed warned the master of the tug, after passing the South Buoy of the Brake, that "he was getting too far to the westward." The master of the *Copeland* alleged that he kept as nearly as possible directly ahead of the ship, so as to have her masts in one, according to the invariable custom of steam-tugs when towing vessels, especially a vessel in charge of a pilot; that the barque's rudder

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ed, the vessel got on shore: — Held, that the tug had no claim for salvage. — In such a case, the master of the tug is not released from all responsibility respecting the direction of the ship towed; but it is the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship.

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was so damaged as to prevent her being steered well, and that the master of the barque had discharged his pilot. The tug being unable to get the barque off the Flats, part of her cargo was discharged into small craft, when she again floated, but, requiring repair before she could resume her voyage, the *Copeland* was employed to tow her to the West-India Docks, where she arrived on the 17th.

The two Elder Brethren of the Trinity House, who assisted the Court below, were of opinion that the getting on the Sandwich Flats was not occasioned by the state of the weather, or by the barque's rudder being disabled, and might have been prevented by ordinary care and skill, and that "there was, on the part of the *Copeland*, gross and culpable negligence and disregard of duty." The Judge concurred in these opinions, and pronounced against the tug's claim for salvage, with costs. From this Judgment the salvors appealed.

July 1.

ARGUMENT.

LORD CAMPBELL (to the Counsel for the Appellants).—No doubt there was negligence in getting upon the Sandwich Flats; the question is, whose negligence,—the pilot's, or that of the *Copeland*? You may restrict yourself to this point,—whose duty was it to prescribe the course?

Sir F. Thesiger, Q.C., for the Appellants.—The subsequent grounding of the barque was the fault of the pilot on board; but even if occasioned by the negligence of the tug, the Appellant's right to salvage is not forfeited, unless the damage arising from such grounding exceeded the benefit of the previous service. If we were entitled to salvage for getting the barque off the Goodwin Sands, supposing nothing afterwards had occurred, we cannot know how much injury she sustained by striking on the sands, and how much by getting on the Flats. [LORD CAMPBELL.—It was a continuous transaction: the service was not completed by getting her off the sand; she was to be got into a place of safety.] That was a subsequent engagement. The service consisted of two separate transactions, and the two claims may be distinguished. Suppose the vessel was got off the Goodwin Sands by the *Copeland*, but for whose aid she would have been lost, and afterwards, by the gross negligence of the

Copeland, she stranded on the Sandwich Flats, and received a very slight injury,—would that annihilate the claim for a most meritorious prior service? The claim for salvage attached when the vessel was rescued from imminent peril on the sand. The damage sustained by grounding on the Flats appears from the master's Protest to have been trifling. Upon the more important point of negligence, it is in evidence, and not contradicted, that it is the duty of a tug steamer, as an invariable rule, to obey the directions of the vessel in tow, more especially when in charge of a pilot. It would be very dangerous to allow a tug to interfere with the pilot on board the vessel towed, whose duty it is to direct the course. [LORD BROUGHAM.—Assuming that, generally speaking, a tug's business is to keep the masts of the towed vessel "in one,"—that is, to keep in its axis,—the question is, whether cases of exception may not arise to require the master of the tug to do something more (the people on board these tugs having great local knowledge, belonging to more confined districts), by himself, or by warning others, calling the attention of the pilot or master to dangers.] I cannot understand how the master of a tug could venture to assume a duty not his own, and which belonged to the pilot, who had charge of both vessels, and was the person to prescribe the course. The master of the barque shewed that he recognized this rule, for he discharged his pilot (who has been deprived of his license), and he employed this very steam-tug to take the vessel up to London. [LORD CAMPBELL.—Suppose the vessel was getting amongst breakers, and the pilot was asleep.] It would be dangerous to allow the master of a tug to exercise his own discretion; to depose the pilot from his authority, and to vest it in another not subjected like him to rigid examination. In *The "Duke of Sussex,"** Dr. Lushington observed that, in the case of a vessel with a pilot on board towed by a steamer, there would be "a dangerous conflict of authorities" if the responsibility were taken from the pilot on board the vessel towed, and cast upon the steamer;

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*Shersby v.
Hibbert.*

* 1 Rob. j. 270. 1 Notes of Ca. 161.

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Hibbert.*

and he held in that case that the fault of a collision rested with the pilot on board the vessel towed. Upon the principle there laid down, I contend that the towed and the towing vessels are to be considered as one; that the pilot on board the former is to be considered in charge of both, and that the responsibility attaches solely to him. No circumstance could arise in which it would be the duty of the master of the steam-vessel to exercise his own judgment, without regard to the discretion of the pilot. [LORD BROUGHAM.—Suppose a circumstance which the master of the steamer saw or knew, and which the pilot could not know or see, ought he not then to act upon his own judgment or discretion?] If he saw breakers ahead, and no man on the fore-castle, he would be bound to call to the steersman, but not to alter his own helm. Unless you lay a foundation of duty, there can have been no negligence on the part of the tug. [LORD CAMPBELL.—Is there not a distinction between the case of a tug, employed to tow, and a tug which is a salvor? This is a case of a claim for salvage.] The principle is the same.

Addams, Dr., on the same side.

Sir J. Dodson, Q.A., for the Respondents.—The *Copeland* is not entitled to salvage, as she did more disservice than service. The rule which casts the responsibility of directing the course of a vessel in tow upon the pilot on board is very wholesome and proper in the case of mere towage; but, in a case of salvage, different duties are imposed upon a steamer, when the salving vessel. The getting the barque on the Sandwich Flats could not have been accidental or by mistake; it must have been either wilful, or through gross and culpable negligence.

Bethell, Q. C., on the same side.—This case involves some very serious and important questions. The getting upon the Flats must have arisen from the negligence or misconduct of some person. If it be said that the steam-tug must steer as the barque was steered, that involves the proposition that the barque could be steered freely, without impediment; whereas the case on the other side is that her rudder was damaged, and that she would not answer her helm.

Then when she got off the *Goodwin*, on whom lay the duty to shape her course? It must have been on the steamer, which was the salving vessel, as the barque would not answer her helm. Here is a steamer towing a disabled vessel, to whose assistance she had come, along a channel familiar to the steamer, which permits her to come into a place where the master of the steamer must have known she would get on shore. [LORD BROUGHAM.—You make the master of the steam-tug in a conspiracy with the pilot to wreck the vessel?] The steamer knew that the barque could not guide herself. [LORD BROUGHAM.—Is the steamer answerable for the damage?] When a steam-vessel takes a disabled vessel in tow, she is bound to exercise a careful and watchful superintendence, and if the disabled vessel gets into danger whilst being towed, the tug is answerable, and if a salvor, she forfeits her claim to reward. [LORD BROUGHAM.—In cases of salvage, we must not weigh the matters in golden scales; otherwise, persons who make a trade of salvage (if there are such) would not incur the risk and trouble of going out to assist, unless it was a clear case.] The damage occasioned by getting on the Flats cancels the merit of the prior service.

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LORD CAMPBELL.—This is an appeal in a cause of salvage by the owners of the steam-tug *Copeland* against the ship *Duke of Manchester*, her cargo and freight. The learned Judge of the Court of Admiralty, having been assisted by two Elder Brethren of the Trinity House, by his Decree, disallowed the claim, and condemned the claimants in costs. JULY 19. JUDGMENT.

Their Lordships cannot accede to the first reason for affirming the Decree propounded by the Respondents, namely, that all the facts having been considered by a competent tribunal, its decision ought not to be reversed without new evidence. We are bound to see whether, in our opinion, the Decree appealed from is well supported in point of fact, as well as in point of law.

In the first place, their Lordships entirely approve of the law as laid down by Dr. Lushington. The question of law is, whether, in a case of salvage, where a tug is towing a

JULY 12.

*Sheraby v.
Hibbert.*

ship that is in peril to a place of safety, the ship being under the command of a licensed pilot, the master of the tug is released from all responsibility respecting the direction of the ship, and is merely to keep her masts in a line with his own. The learned Judge below repudiated the doctrine, that under no circumstances was it the duty of the master of the tug to interfere, and that the pilot was, under all circumstances, the only person to blame; and he laid down, that the master of the tug, watching the course which the licensed pilot pursues, if he finds that this course will lead the vessel into danger, is bound to interfere, and make a communication to the master of the ship, instead of making himself instrumental to the destruction of life or property. Their Lordships are entirely of the same opinion, and consider it the joint duty of the licensed pilot and of the master of the tug to do their utmost for the safety of the ship. Therefore, however much the licensed pilot may misconduct himself, if the master of the tug, through gross negligence, omits to do what was in his power to keep the ship in a proper direction that she may reach a place of safety, and thereby the ship is lost, or is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. This is not a claim for ordinary work and labour, but for salvage. The very notion of salving a ship supposes that the salvor, instead of merely executing orders, shall perform some extraordinary service, and exert himself to the utmost for the safety of life and property.

Finding of the
Trinity Mas-
ters.

In this case, the Elder Brethren of the Trinity House found "that the stranding on the Sandwich Flats might have been prevented by ordinary care and skill," and "that there was, on the part of the *Copeland*, gross and culpable negligence." The damage occasioned by this stranding appears to have been greater than that occasioned by the stranding on the Goodwin Sands; and therefore, if the finding was justified by the evidence, the claim to salvage was properly disallowed.

The tug is
pari delicto with
the pilot.

Now, although the pilot clearly was guilty of negligence, and was very properly dismissed from the service, the master and crew of the tug were likewise guilty of gross negligence,

and their conduct even raises a suspicion that they had some ill design. Belonging to Ramsgate, they must have been familiarly acquainted with the ground, and the course taken by the ship after she was got off the Goodwin Sands was clearly not the course to the Downs, whither they were told the ship was to be carried. But, further; it is expressly alleged in pleading by the Respondents, and not denied by the Appellants, that "William Wells, not long before the ship was towed ashore on the Sandwich Flats, told the master of the *Copeland*, that he was steering too much to the westward, but that the said master refused to alter his course." Indeed, the learned Counsel for the Appellants, in their Arguments at the Bar, relied upon the doctrine, that, the ship being under the care of a licensed pilot, the master of the tug had nothing whatever to do with her direction, beyond keeping her masts always in a line with his own.

Looking to the state of the wind and weather, there seems not to be the smallest doubt that, by a reasonable exertion of care and skill on the part of the tug, the ship might easily have been brought to a place of safety in the Downs, and enabled to pursue her voyage to the West Indies, instead of being again stranded, and obliged to be brought back to port to refit. There has, therefore, been no meritorious service in respect of which salvage ought to be decreed.

An attempt was made to separate the towing of the ship from the operation of getting her off the Goodwin Sands; but their Lordships are of opinion that they cannot be severed; that there was no fresh engagement, and that the whole forms one transaction of salvage. When the ship had been got off, there was reason to apprehend that her rudder had been injured, and without forfeiting her right to salvage, the tug could not then have deserted her. The claimants, in their pleadings, describe the whole of their services as of the same character, and claim extraordinary remuneration for the whole on the principle of salvage.

Their Lordships will, therefore, advise her Majesty that the Decree appealed against should be affirmed, with costs to be paid by the Appellants.

JULY 18.

Sherby v.
Hibbert.

The towing
and the getting
the vessel off
the sand, one
transaction.

Judgment
affirmed.

JULY 19. LORD BROUGHAM very emphatically declared his dissent from this judgment.*

*Shersby v.
Hibbert.*

Proctors: — *Rothery*, for the Appellants; *Deacon*, for the Respondents.

Prerogative Court of Canterbury.

JULY 22.

A testator, **PAYNE AND MEREDITH v. TRAPPES.** — *Cause.* — This having executed a will, in duplicate, 12th May, 1837, disposing of real and personal estate, in 1838, executes another inconsistent will, at the same time cancelling the part of the former will in the possession of his solicitor (the other part being in his own possession), and in 1839, executes a codicil, bequeathing a small annuity, describing it as "a codicil to my will made by C. M., of &c., dated 12th May, 1837," C. M. being also the drawer of the will of 1838: — Held, that the will of 1837 was re-

was a cause of proving the will of Mr. George Payne, who died 23rd September, 1846, leaving a widow, and two daughters, Caroline F. L., wife of Mr. Roger Milton Trappes, and Georgiana F. A. H. Payne, spinster. He left a will, dated 12th May, 1837; a codicil of the same date; a will dated 17th October, 1838, and a codicil dated 9th November, 1839. By the will of 1837, he devised certain real estates to his wife for life, and after her death, one estate to each of his daughters, and his personal estate (except household goods, which he bequeathed to his wife absolutely) in trust for his wife for life, and at her death in trust for his daughters (both then unmarried), in moieties, for their separate use, with power of appointment, and in case the trusts as to either moiety should not take effect, then the whole to be for the benefit of the trusts of the other moiety, and in case the trusts of both moieties should fail, then in trust for his two daughters equally; and he appointed his wife and Mr. Charles Meredith executors. This will was executed in duplicate. By the codicil of the 12th May, 1837 (also executed in duplicate), he bequeathed £1,000 to his wife, and in other respects confirmed his will. By the will of

* The Committee consisted of Lord Brougham, Lord Langdale (M.R.), Lord Campbell, and Mr. Pemberton Leigh.

1838 (also executed in duplicate), he gave and devised the whole of his property, real and personal, to his wife, and appointed her, Mr. G. H. Frederick, and Mr. Charles Meredith, executors, revoking all former wills and codicils. By the codicil of 1839, he bequeathed an annuity of £20 to his sister, Louisa Payne. This codicil, which is in the testator's handwriting, begins thus:—"I, George Payne, write this as a codicil to my will, made by Charles Meredith esquire, of No 8 New Square, Lincoln's Inn, London, dated 12th May 1837." The will of 1838 and the codicil of 1839 were propounded (the latter as a codicil to the will of 1838) by the widow and Mr. C. Meredith, the surviving executors named in that will, against Mrs. Trappes, a legatee named in the will of 1837.

The Allegation, propounding the will of 1838 and the codicil of 1839, pleaded that such codicil does not shew any intention to revive the will of 12th May, 1837 (in terms therein referred to), nor had the testator any intention by such codicil to revive the same; that, subsequently to the execution of the will of 12th May, 1837, his daughter Caroline married Mr. Trappes, and the testator expressly, as he declared, in consequence of such marriage, executed the will of 17th October, 1838, thereby revoking the will of 1837; that the will of 1838 was made by Charles Meredith, Esquire, of New Square, Lincoln's Inn, as well as the will of 1837, one part of which was in Mr. Meredith's possession from the time of the execution of such will until the execution of the will of 17th October, 1838, on which day, after the execution thereof, the testator, being then at the office of Mr. Meredith, cancelled such one part, by cutting off his signature and seal therefrom, as also from the codicil thereto of even date therewith, and by signing his name under the word "cancelled" indorsed on each; that when the testator wrote the codicil of 1839, the duplicates of the will and codicil of 1837 were, as was also one part of the will of 1838, in his possession, and that, by error or mistake, he inserted the date of the former in the codicil, instead of that of the latter (the will of 1838), such codicil being made by him solely for the purpose of bequeathing

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vived, the Court not being at liberty to receive parol evidence to shew that the testator had referred to the will of 1837 by mistake, instead of the will of 1838.

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an annuity to his sister, to whom, two days after its execution, he gave the codicil, closely sealed up, desiring her (and which she did) to keep the same in her possession, and not to open it until after his death.

This Allegation was opposed, but admitted by the Court.*

No witnesses were examined upon this Allegation; but Mrs. Trappes, in her Answers, admitted the *facta* of the will of 1838 and the codicil of 1839, submitting to the judgment of the Court whether such codicil does or does not shew an intention to revive the will of 1837, and denying that the testator had not an intention by means thereof to revive the said will: she admitted her marriage subsequently to the execution of the will of 1837, but she said that such marriage took place on the 22nd November, 1838, which was subsequent to the will of 1838, and that no property was settled upon her in respect of such marriage, and she denied that the testator, in consequence of her marriage, executed his will of 1838, or that he declared he had so done: and lastly, she denied that the testator, by error or mistake, inserted in the codicil of 1839 the date of the will of 1837 instead of that of the latter will, and that he executed such codicil solely for the purpose of bequeathing an annuity to his sister.

ARGUMENT.

Addams, Dr., for the executors.—This case is distinguished from all others of an analogous kind. When the testator destroyed the duplicate of the will of 1837 in his solicitor's possession, he cancelled and destroyed the other part in his own possession. There is nothing on the face of the codicil of 1839 to shew any intention to republish and revive the prior will, except that that will is referred to by date. It might be a question under the present Act, whether it was his intention to supersede the intermediate will of 1838; but that is not necessary to be determined in the present case. The prior will was destroyed to all intents and purposes; and unless some case can be shewn in which it has been held that a mere reference to a destroyed will revoked

* See *ante*, p. 147.

an intermediate will, the will of 1838 must stand. No such question has hitherto arisen; in other cases, the will has existed, though revoked; here the will was cancelled and destroyed.

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Jenner, Dr., for the legatee under the will of 1837.—I do not say that, where a testator destroys the copy of a duplicate will in his possession, the other, in his solicitor's custody, is not destroyed; but where he destroys the copy in the solicitor's possession, and the copy in his own possession is kept uncanceled and undestroyed, the presumption is weaker. On the face of the paper of 1839, it appears clearly to be intended to operate as a codicil to the will of 1837: "I write this as a codicil to my will dated 12th May, 1837." If the Court makes this a codicil to the will of 1838, it must strike out the words, "12th May, 1837," and put in, "17th October, 1838." The circumstances under which the wills were made are material. That of 1837 gives the property to the wife for life, and then to the daughters; within a year, without any reason, he revokes this will, and gives the whole property to the wife. What is there to shew why he revoked that will? The case set up in plea, but not proved, is that it was done in consequence of the marriage of the daughter; but there is nothing to shew that the testator was not in every respect a consentient party to that marriage. If so, the Court ought to know what took place at the execution of the will of 1838. Suppose the wife had some objection to the marriage, and that she prevailed upon the testator to make this will, and he, meaning to revoke it, and not wishing to make the revocation public, executed this codicil, and gave it, not to his solicitor, but to the legatee. [PER CURIAM.—I expected, when I admitted the Allegation, to have had some information from evidence, not the mere Answers of the party.] A codicil is taken to be a constituent part of that will to which it is a codicil. If this is a codicil at all, it must be a codicil to the will of 1837. Mr. Jarman,* speaking of the republication of wills, says:—"Such questions may occur even in regard to wills made

* On Wills, 1 vol. 173.

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since 1837; for though the 22nd section of the recent Statute prevents the revival of a revoked will, except by re-execution, or by 'a codicil shewing an intention to revive the same,' and, therefore, no such effect would follow from the mere revocation of a posterior revoking will; yet, probably, it would be still held, according to the doctrine in *Lord Orford's Case*,* that a recognition in a codicil of the earlier of two inconsistent and undestroyed wills, by date or otherwise, as the will on which the codicil is founded, shews an intention to revive the will."

Addams, in Reply.—Mr. Jarman, therefore, considers the law to be altered by the 22nd section of the present Act, as he says "probably." But he speaks of an "undestroyed" will; this was a destroyed will. The testator destroyed that part in his solicitor's possession; what reason he had for keeping the other part is not known—perhaps that it might serve as a draft. The reference in the codicil of 1839 to the will of 1837 was purely accidental, and if so, the Court may decree probate of that codicil with the will of 1838, though it apparently refers to the will of 1837, which, in legal consideration, was not in existence, the only will in existence being the will of 1838; so that the codicil must be a codicil to that will.

JUDGMENT.

SIR H. JENNER FUST.—In this case, the paper propounded, dated 9th November, 1839, purports to be a codicil to the will of Mr. George Payne, dated 12th May, 1837; and the question which arises is this: whether this codicil, purporting to refer, and to be a codicil, to the will of 1837, is or is not to be taken as a codicil to a will of 1838, of a very different tenor from that of 1837. The information given to the Court is contained in the paper itself, in the Allegation propounding the paper as a codicil to the will of 1838, and in the Answers of the party.

Nothing can be more specific than the reference in the codicil of 1839 to the will of 1837:—"I, George Payne, write this as a codicil to my will made by Charles Mere-

* *Walpole v. Cholmondeley*, 7 T. R. 138.

dith Esquire, of No 8 New Square, Lincoln's Inn, London, dated 12th May 1837." It would even seem that the deceased had taken great pains to describe the instrument to which this was to be a codicil. The Allegation, however, pleads "that such codicil does not shew any intention on the part of the testator to revive his will of the 12th May, 1837 (in terms therein referred to), nor had the testator any intention by means of such codicil to revive the same." This is the point upon which the opinion of the Court is to be taken, whether the codicil does shew an intention to revive the will of 1837.

(After stating the remainder of the plea.)

These are the circumstances under which the codicil of 1839 is propounded as a codicil to the will of 1838, although it purports to refer, and to be a codicil, to the will of 1837. When the Allegation came before the Court, the Court, having heard the Argument on both sides, was of opinion that it was proper to admit the Allegation, reserving all questions to the hearing of the cause; although it did expect to be furnished with some information as to the making of the will of 1838, and the cancellation by the deceased of the duplicate of the former will.

Mr. Meredith, being a party in the cause, could not be examined as a witness, and the Court is bound to look into the Answers of the party. Now the other side did not think fit to admit some not unimportant parts of the Allegation. In particular, the motive pleaded in the Allegation for making the will of 1838 is not admitted, but is denied.

The circumstances stated in the plea and Answers being, with the paper itself, the only evidence before the Court, the real question is, whether any alteration has been made in the law by the present Wills Act, for it is admitted that, according to the decision in *Walpole v. Cholmondeley*,* before 1838, the Court could not admit parol evidence to explain to which will the codicil referred, but that by the codicil itself must be determined the date of the will to which it was a codicil, and parol evidence could not have

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* 7 T. R. 138.

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been received before the Wills Act to shew that the reference in the codicil was by error and mistake.

Now the 22nd section of the Statute enacts "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same." There can be no doubt, under the present law, any more than under the old, that a will which has been revoked is revived when you have a codicil itself shewing an intention to revive it: where a party refers in a codicil specifically to a will by date, he does *primâ facie* necessarily shew an intention to revive that will. Here are two wills, one of 1837, the other of 1838. By that of 1838, the party deceased meant to revoke the will of 1837,—there is no doubt of that; if there was any doubt, it would be removed by the fact that, immediately after its execution, he tore off the signature and the seal of the duplicate of the former paper,—tearing being one of the modes of revoking,—and signed his name to the word "cancelled" indorsed thereon. But I do not agree entirely with the argument of the learned Counsel who supports the will of 1838, that, as the deceased cancelled the copy of the will in the possession of his solicitor, therefore the duplicate copy in his own possession ceased to have any vitality. That copy of the will existed in its original state, and continued so up to and at the time when he executed the codicil of 1839.

Then I think the question comes to this: can the Court, under such circumstances as these, enter into a conjecture whether this reference to the will of 1837 was made by error or mistake, or not? Is the Court at liberty to infer that the codicil referred to the will of 1837 by mistake, and that it was meant to be a codicil to the will of 1838? Perhaps, the Court, if it were to indulge in conjecture, might believe it was a mistake, and that it was meant to be a codicil to the will of 1838; but I am afraid the law would stand upon a loose principle if the Court were to depart from the rule laid down in *Walpole v. Cholmondeley*. I am of opinion that the Court would not be justified in doing so, and

The rule of
law unaltered
by the Statute.

that I am bound by the rule laid down in that case, though decided before the passing of the Wills Act. I think there is no real distinction between the cases, and that where a codicil refers to a revoked existing will by date, the intention to revive it is shewn upon the face of the codicil itself. So in a Motion not before me, but before Dr. Lushington, when he sat for me, *In the Goods of Chapman*,* that learned judge held that the intention to revive was shewn from the paper itself, and that it could not be shewn by parol evidence; and the Court decided that parol evidence could not be received in such cases, and that the rule laid down in *Walpole v. Cholmondeley* applies to cases since the Wills Act. In this case the will was in existence; it was not destroyed, though one part had been revoked and cancelled, and the cancellation of one part was *prima facie* a cancellation of both; but a codicil could set up that will again, and this codicil does expressly refer to that will of 1837. The single question, therefore, is, whether the Court can admit parol evidence to shew that the reference was a mistake; and I am of opinion that it cannot; and I must pronounce against the validity of the will of 1838.

At present, the will and codicil of 1837 with the codicil of 1839 are not propounded, therefore the Court cannot decree probate of those papers to pass. My opinion is strong, that the Court cannot receive parol evidence to shew that the deceased referred to the will of 1837 by mistake, and that the codicil of 1839 was intended to be a codicil to the will of 1838, to which it has no reference whatever. I pronounce against the validity of the will of 1838 and the codicil of 1839 as a codicil to that will.

Will of 1838
pronounced
against.

Addams.—I have no objection to probate being decreed of the will and codicil of 1837, and the codicil of 1839.

PER CURIAM.—Very well. Let the costs be paid out of the estate. I never had any doubt from the first respecting this case, but I thought it better to have all the facts in evidence before me.

(The will of 12th May, 1837, with the codicil of the same

* 1 Robert. 1. 3 Notes of Ca. 198.

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JULY 22. date, and the codicil of 9th November, 1839, were then pronounced *apud Acta*, and the Court pronounced for them.

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Proctors:—*Nicholson*, for the executors; *Abbot*, for the legatee.

A testator, *OLLIVE v. WEALE*.—*Cause*.—Mr. Thomas Charters, the having, in 1840, deceased in this cause, late of New Bond Street, died at duly executed his will, where- Nice, in Sardinia, where he had resided for some time, 10th in he declared January, 1847, having made with his own hand and executed "that all codi- cils added, if signed by him, after executing that will, should be equally valid as if placed in the body of that same will," wrote, on the fourth side of the paper, and signed, two testamentary papers, entitled "Codicil No. 1," and "Codicil No. 2," the first dated two days after the will; in 1843, re-signed and re-executed the will, assigning, in a memorandum written thereon, and to the subscribing witnesses, as his reason for such re-execution, that "two of the former witnesses were dead;" and, having made certain alterations in the will, in 1844, again re-signed and re-executed the will, in the presence of

OLLIVE v. WEALE.—*Cause*.—Mr. Thomas Charters, the deceased in this cause, late of New Bond Street, died at Nice, in Sardinia, where he had resided for some time, 10th January, 1847, having made with his own hand and executed his will in England, bearing date the 19th September, 1840, and thereof appointed his nephew, Thomas Ollive, with two others, executors and trustees, and named the former residuary legatee for life, and after his death, bequeathed the residue to the children of Mr. Ollive and of his nieces, Frances Weale and Frances White. In the body of this will is a clause to the following effect: "And I declare that all codicils added, if signed by me, after executing this will, shall be equally valid as if placed in the body of this same will." The testator then bequeaths certain legacies, and appoints the executors and trustees, and concludes as follows: "Now, being fully aware of the bad grammar and imperfections of this will, from it being my own drawing, I desire that the sense and meaning the majority of my executors, or one of them, if no more should act in administration, puts on this will, shall be conclusive for my legatees, or any person claiming an interest under this will. I wish to prevent law." This will was attested by three witnesses, named Emerson. On the 3rd October, 1843, the testator re-signed and re-executed this will in the presence of two subscribed witnesses, writing under his original signature the words "This will was re-signed and executed because the two former Emersons was dead. T. Charters." On the 5th August, 1844, he again re-signed and re-executed the will in the presence of the same witnesses who attested the preceding re-execution, and who again subscribed the will, which bore the following memorandum below the testator's signature: "I here acknowledge to have altered the 17th and 23rd lines of the second page of this my last will, and

placed my initials each end thus, T. C." Then follow the signatures of the two witnesses, and immediately after, in the handwriting of the testator, "Witnesses to the above signature of me, Thomas Charters, this 5th day of August, 1844, at Kentish Town;" which writing fills up the third page of the paper. On the fourth page appear the following codicils:—

Codicil, No. 1. To prevent any misunderstanding, I hereby declare it as my wish that my cloaths, watches, and all other personal property that I may leave behind me at my death ["T. C. not funded. T. C." *interlined*] and not otherwise disposed of, shall go to and belong to my next heir, Thomas Ollive, my nephew, for his sole use and benefit for ever. Sept. 21st, 1840. Thomas Charters.

Codicil, No. 2. I wish my executors to pay nineteen guineas to my friend Elizabeth White, late of ["26 T. C." *interlined*] Park Crescent, 26, Portland Place, St. Marylebone, Middlesex, she having formerly lived as servant with me in 1842. Thomas Charters.

The testator did not, at the times of the re-execution of the will, in their presence, point out to the witnesses, or allude to, the codicils, nor were they aware that any such codicils were written on the will.

The property, consisting principally of money in the funds, was about £30,000.

The Court was moved, on behalf of Mr. Ollive (the other executors declining to prove), for probate of the will, and of the writings on the fourth side of the will as codicils thereto.

Sir J. Dodson, Q.A., in support of the Motion.—After *Lord Hertford's Case*,* the codicils, not being in existence at the time of the first execution of the will, could have had no effect; but afterwards the testator re-executed his will. [PER CURIAM.—Are these codicils? Is there any distinction between this case and that of *Nazer*,† decided this

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Ollive v. Weale.

the same subscribing witnesses, who deposed to their strong impression and belief that, upon both occasions of re-execution, the testator signed the will in their presence after they had subscribed it, and who could not identify anyone of the several signatures of the deceased appearing on the will, as made or acknowledged in their presence, or depose to the existence of the codicils on the back of the will at the time of either re-execution:—Held, that there was not sufficient proof of re-execution, and the will alone pronounced for as originally executed.

April 20.
MOTION]

* 2 Notes of Ca. 230. 3 Curt. 468. 3 Notes of Ca. 150. 4 Moo. P. C. C. 339.

† In the Goods of *Henry Nazer, dec.*—The deceased, a commander *Re Nazer*, in the Navy, died 10th November, 1846, having duly made his will, dated

JULY 22. morning ?] The words of the will are "all codicils added if signed by me after executing this same will;" and the will must speak from its last execution.

Ollive v. Weeks.

PER CURIAM.—You must propound these papers. I reject the Motion as it stands.

The papers were accordingly propounded, on behalf of the executor, against one of the residuary legatees substituted, in an Allegation, pleading the facts already stated, the admission of which was opposed.

dated 18th March, 1843, which contained no appointment of executors. On the 6th June, 1846, the deceased (who resided in Somersetshire), being in London, executed a codicil (appointing executors) at the office of his solicitor, on which occasion the deceased and his solicitor had some conversation about the necessity of being very particular in the attestation of wills, when the solicitor informed him that it was safer to use the words, "all being present at the same time," and asked him if his will, which the deceased had written himself, and which he had left in the country, was properly executed, and gave him the form of attestation. On the return of the deceased to the country, he re-executed his will on the 10th July, 1846, having added an attestation-clause containing the words, "all being present at the same time." It appeared that the codicil was present at the time of re-execution, and that the deceased adhered to it subsequently to the re-execution of the will. In Hilary Term,

Feb. 13.

Sir J. Dodson, Q.A., moved for probate of the will and codicil to the executors, named in the codicil.

PER CURIAM.—Can I, in the absence of the parties interested, decree probate of both these papers? It is an unfortunate case, as there was as good an attestation of the will in the first instance as could be. I reject the Motion. The question should be brought in a more formal manner before the Court.

April 20.

Sir J. Dodson renewed his Motion, on a proxy of consent from the parties interested. [**PER CURIAM.**—Will that revoke the Act of Parliament? When does the will speak from?] From the re-execution; but the question is, whether the Court could not admit parol evidence.

PER CURIAM.—Then I must have it argued; I cannot decide that question upon *ex-parte* Motion: it is a very nice point. Here is a direct and positive re-execution of the will, and a reference to the will only, and a revocation in the will of all former instruments; what then became of the codicil? I must reject the Motion.

(The papers were afterwards propounded.)

Phillimore, Dr., for the substituted residuary legatee, against the Allegation.—On the face of the papers written on the back of the will, they are not executed according to the Statute, as they are not attested. This Allegation is to supply the defect on the face of the papers, and it is good for nothing unless the absence of witnesses is supplied by the facts pleaded. In *Lord Hertford's Case*, it was held that a testator had not power to validate by his will codicils to be executed after its date. The object of the law is to prevent every thing that might serve as a handle for fraud, and what could be more convenient for the purposes of fraud than the giving facilities for the incorporation of post-written papers in a will? The Allegation pleads no facts to identify the papers as existing at the times of the re-execution of the will.

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JUNE 5.

ARGUMENT.

Harding, Dr., on the same side.—There is nothing in the Allegation to lead to the presumption that these were independent papers referred to by the will. For the purpose of incorporation it must be proved that the instrument referred to was in existence at the time, and that nothing more was to be done to it. *Habergham v. Vincent*.* In *Smart v. Prujean*,† the paper was rejected because it was not found in the place or custody where the deceased said it would be deposited. [PER CURIAM.—So in the case this morning,‡

* 2 Ves. j. 204.

† 6 Ves. 565.

‡ In the *Goods of William Astell, dec.*—The deceased died 7th March, 1847, leaving a will, duly executed, dated 8th December, 1842, appointing his two sons executors, and one of them residuary legatee. In the fifth sheet of the will was the following clause:—"I give such portions of my plate, jewels, linen, wines, &c., as shall be specified in a list which it is my intention to annex to or leave with this my will, to my daughters, S. and H. A., jointly, while they both remain unmarried, and on marriage or death of either of them, I give the same to the survivor or other of them absolutely." No paper answering the description here given was found annexed to or left with the will, which had been deposited in an iron strong-box in the deceased's private room, at his residence in the country. After a careful search amongst the deceased's papers, a paper was discovered in a private drawer in a room in his town residence (where it was found lying loose with various other private papers), which is signed by the deceased, and dated 8th July, 1841, commencing thus:—"I declare this to be the list of sundry arti-

JULY 22. in which I rejected the Motion.] Then *cadit questio*, for the deceased puts the matter out of dispute,—“all codicils added if signed by me after executing this same will.” It is said he re-executed the will after making the codicils. What is the meaning of the words “after executing this same will?” If the re-execution of the will was the execution of the codicils, they were signed *before*, not *after*, and they do not answer the description. If he meant codicils he might execute, they were not then in existence, and they fall within the principle of *Lord Hertford's Case*.

Sir J. Dodson, contra.—The question is, whether the clause in the will, purporting to make a reservation of the power to add codicils signed by him to his will (which reservation *per se* would not be good), coupled with the fact of the re-execution of the will after the making of the codicils, is not sufficient to satisfy the law; and whether the Court cannot collect from the instrument that the papers are so clearly pointed out and identified that there can be no doubt of their being codicils referred to by the testator in the will, which was re-executed after they were in existence. It is settled by *Lord Hertford's Case*, that a party has a right to refer in his will to a paper in existence at the time of its execution, so as to make it, if identified, a component part of the will itself, though otherwise invalid, and of the same effect as if copied into the will. The only question, therefore, is, whether the will has referred to the instruments so

cles which I bequeath to my children respectively, as referred to in my will, dated this day.” Then follows a description of various articles of plate, wine, furniture, pictures, &c., which were to be given to the testator's daughters, S. and H. A., and to other persons.

Bayford, Dr., moved for probate of the will with the memorandum.

PER CURIAM.—I am not sufficiently satisfied that this is manifestly the paper referred to in the will. The testator expressly states that it was his intention to annex the paper to, or leave it with, his will, and it is not identified (as to the date of the will) as the paper referred to. It may be so, but it appears to me not to be the paper he intended to refer to. I must reject the Motion. I am clearly of opinion that the paper is not sufficiently identified as that referred to by the deceased in the will of 1842, so as to enable the Court to pronounce for it as part of that will; and I decree probate of the will alone.

manifestly as to leave no doubt as to their identity, and whether they were in existence at the time when the will was re-executed. It is clear that the testator contemplated the incorporation of some papers, which he calls "codicils," in his will. These codicils are written on the back of the will, and the first is dated 21st September, 1840, two days after the execution of the will; but the will was re-executed on the 3rd October, 1843, and again on the 5th August, 1844. The only question is, whether the testator has not by these re-executions incorporated the contents of these papers into his will. [PER CURIAM.—You argue that the will speaks from the date of its re-execution?] Yes.

JULY 22.
Ollive v. Weale.

Bayford, Dr., on the same side.—The first thing a Court of Probate considers is to endeavour to carry out the intentions of the testator. The testator in this case clearly intended, when he wrote the will, that all codicils he might make after the will should be valid, if signed by himself; and these two papers are called by him "codicils, No. 1 and No. 2," and they are signed by him. When we see that the will, when originally executed, and upon both occasions of re-execution, is signed in the presence of witnesses and attested, it is clear he must have known that, if not incorporated with his will, they would be invalid if not attested. In *Ingoldby v. Ingoldby*,* the Court took the distinction between that case and *Lord Hertford's Case*, that, in the latter, there were two descriptions of papers termed "codicils," executed and un-executed. The 34th sect. of the Statute makes all wills re-executed speak from the date of re-execution, so as to let in every paper referred to which was in existence at the time.

SIR H. JENNER FUST.—I am of opinion to admit this June 25. Allegation, as well as that in *Wade v. Naser*,† because I think the effect of the Statute, as to the republication, and re-execution, and revival of wills, ought to undergo discussion, and receive a deliberate construction; and for that purpose the Court should have all the facts properly before

JUDGMENT.

* 4 Notes of Ca. 403.

† See *post*.

JULY 22. it, in order to arrive at a correct decision. I shall, therefore, admit both these Allegations, that the Court may dispose of the question with more satisfaction to itself.
Ollive v. Wende.

The two subscribed witnesses to the re-execution of the will, Mrs. Alder and Mrs. Prince, her daughter, were examined upon the Allegation, and they deposed that at neither time of re-execution was any allusion made by the testator to the codicils or writing at the back of the will (of which they had no knowledge); they spoke strongly to their impression that, upon both occasions, the testator signed the will *after* they had subscribed it; and neither witness could identify the signature she attested.

JULY 22. Upon the first question, whether there had been a due
 ARGUMENT. re-execution of the will.

Sir J. Dodson.—I submit that, upon the evidence, it is clear that the signature of the testator was made in the presence of the witnesses before they attested it, or, if not, that he acknowledged his signature already made before they subscribed the will. Mrs. Prince says that, on the first re-execution, the testator signed the will in her presence and that of her mother, though she “feels nearly positive” that he was the last of the three who signed; she thinks she may positively say it was so, “her impression is so strong about it.” But from the appearance of the signature the Court would infer that the testator signed first. [PER CURIAM.—As far as I can judge, part of the letter “s,” at the end of his name, is under the seal. The witness knows nothing of any seal being there at the first execution.] Upon the second re-execution, she “believes” they signed in the same order as before, “that is, Mr. Charters being the last of the three to sign.” The other witness speaks to the same effect. But supposing, at this last re-execution, the two witnesses signed first, still it was a good re-execution, because the testator acknowledged his signature previously made: he produced the will to the witnesses, as his will, with his signature to it. [PER CURIAM.—He did not produce the will with his signature thereto which they purport to have attested.] The witness says, the testator asked her mother

and herself to be witnesses to his will. "He had a paper in his hand, which he said was his will, and which was thereupon signed by us." Suppose he had not affixed his second signature before they attested, he produced the paper as his will, with his signature to it. [PER CURIAM. —But they did not attest *that* signature.] The usual rule is, where there is a signature to the will, and the testator produces his will with his signature affixed, to consider that as sufficient.

JULY 22.

Olive v. Weale.

Bayford, Dr., on the same side.—This will was produced to the witnesses with the testator's signature attached to it. [PER CURIAM.—Do they say so?] No. In October, 1843, the testator signed the will, either before or after the witnesses signed, in their presence; so that, when the will was produced to them again, in August, 1844, they must have known that his signature was to it. We have it from the testimony of the witnesses, that, in August, 1844, when the will was produced to them, the second time, it had the signature of the testator (for they depose to his writing his name in October, 1843), and he wrote under the names of the witnesses "Witnesses to the above signature of me, Thomas Charters." [PER CURIAM.—When was that written?] Before the 28th August, 1844, for the paper was inclosed in an envelope of that date. If the witnesses knew that this was his will, and that, when he produced it, his signature was affixed thereto, it is no matter which signature it was. [PER CURIAM.—Yes; they must know which signature they attested. Which signature did they attest?] The first signature was witnessed by the Emersons. Then a subsequent signature was attached to the will, and in October, 1843, there was an attesting of the signature or not. If there was, then the re-execution was good; if not, there was no re-execution at all at that time, and the signature was unattested. When the will came before the witnesses again, they attested *that* signature. [PER CURIAM.—Did he mean, when he produced the will the second time, to acknowledge *that* signature?] Where a testator signs his will in the presence of one witness, which is not a valid execution, and subsequently produces the will to the same

JULY 22. and another witness, saying "This is my will," and both attest, the execution has been held to be good. [PER CURIAM.—In that case there is but one signature. Here the witnesses cannot say which signature they attested. It would be carrying the doctrine of virtual acknowledgment farther than the Court is inclined to extend it.]

Ollive v. Wooty.

Upon the second point, whether the re-execution of the will, assuming it to be good, rendered the codicils valid.

Sir J. Dodson.—Unless the Court goes with me upon the other point, I cannot carry the case further. [PER CURIAM.—"After executing this same will:" when was it executed?] According to our case, the will was executed three times, in September, 1840, October, 1843, and August, 1844. The effect of re-execution, under the Statute, is to make the will speak from the time of re-execution, and consequently, the will being re-executed after the codicils, it republished and gave effect to them. *Re Smith.* Utterton v. Robins.† De Bathe v. Lord Fingal.‡*

Bayford, on the same side.—The cases of *Croker v. Marquess of Hertford*, *Habergham v. Vincent*, and *Smart v. Prujean*, furnish the principles applicable to this part of the case. In the first place, it is necessary to consider the intention of the testator. He clearly meant the codicils to operate. [PER CURIAM.—Did he intend to make them operative by the re-execution of the will? Did he not mean by his will to reserve to himself the right to make unattested codicils, not then in existence, operate as part of his will?] It may be so. We can only get his intention from the paper itself. He does not say, "after the execution of this will," but "after executing this will," and he did execute it formally. Then when he put the word "codicil" to the writing on the back of the will,—“Codicil No. 1,” and “Codicil No. 2,” there cannot be a doubt that he meant they should correspond with the description in the will, “codicils signed by me after executing this same will.” Then we have the *intention* to incorporate, if the law permits, and we have *identification*. Then the 34th sect. of

* 2 Curt. 706. S. C. 1 Notes of Ca. 1.

† 1 Ad. & Ell. 423.

‡ 16 Ves. 167.

the Statute says that "every will re-executed, or republished, or revived by any codicil, shall, for the purposes of this Act,"—not for all purposes,— "be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." Then, if the codicils were written prior to August, 1844, they are entitled to be incorporated in the will.

JULY 22.

Ollive v. Wale.

Phillimore, contra, stopped by the Court.

SIR H. JENNER FUST.—My mind is made up. (After JUDGMENT. stating the case.) On the face of the will, it was duly executed on the 19th September, 1840. It contains a clause which shews that the testator wished to reserve to himself a power to give effect to codicils to his will made without the formalities required by the Statute,—a power which the law will not permit a testator to avail himself of. This was settled in *Lord Hertford's Case*, and had been decided in previous cases. In *Lord Hertford's Case*, there were papers which answered to the term "codicil," being regularly executed, and others which might be popularly so called, signed by the testator, but not executed according to the Statute; and it was decided that the term "codicil" must be taken to mean "codicils duly executed." When the will in the present case was found, after the death of the deceased, it purported to have been re-signed and re-executed, "because two of the witnesses were dead," this being assigned by the deceased as his reason for re-executing the will. On the 8rd October, 1843, this second execution purports to have taken place in the presence of Mrs. Alder and Mrs. Prince; that is, the three persons,—the testator and the witnesses,—signed their names, the witnesses believing that they signed first and the deceased afterwards. Under the name of the deceased is written (when does not appear): "I here acknowledge to have altered the 17th and 23rd lines of the second page of this my last will, and placed my initials each end thus, T. C." I suppose this was written in October, 1843, on the first re-execution; but whether on the first or second, it is difficult to say. Then follow the signature of the deceased and the signatures of the same

JULY 22. witnesses, Mrs. Prince and Mrs. Alder, and the words, in the deceased's handwriting I presume, "witnesses to the above signature of me, Thomas Charters, this 5th day of August, 1844, at Kentish Town."

Ollive v. Wcale.

The will was, therefore, duly executed by the deceased the first time, as there is nothing to impeach the validity of the first execution; and the first question is, has there been a due re-execution of the will? If not, it is clear that the codicils can have no effect. This leads to the consideration of the depositions of the subscribed witnesses.

The evidence
as to re-execu-
tion.

Mrs. Prince says: "On the first occasion, Mr. Charters came into the dining-room, which was occupied by us and where papa and mamma and I were, and said, addressing mamma and me, that he had a little favour to ask; would we be witnesses to his will? I understood him to say that two Mr. Emersons, who (as he said) had been witnesses to his will, were dead; I understood him to say that it was on account of their being dead, he wished us to be witnesses. He had a paper in his hand which he said was his will." There was nothing at this time, therefore, but the bare production of the paper, which he said was his will, and asking them to be witnesses to it; and at this time, I apprehend, the will had the words, under the first signature, "This will was re-signed and executed because the two former Emersons was dead. T. Charters." That, I apprehend, was written in October, 1843. "We all signed in the presence of each other, and one immediately after the other. I do not positively recollect in what order we signed, but I rather think that Mr. Charters was the last of the three that signed: I am almost positive that he was. I did not read any of the writing on the will. There was nothing written upon it in our presence but the signatures of us three. So soon as it was signed, Mr. Charters took possession of it. I do not recollect noticing whether there was any seal to the will; if there was, it was not affixed in our presence:" and the second witness does not remember any seal. Then the will is produced to Mrs. Prince by the Examiner, and she says: "I am not able positively to say which of the signatures of Mr. Charters appearing on the will it was that he

wrote in our presence." Was it the signature to the memorandum "This will was re-signed and executed because the two former Emersons was dead. T. Charters;" or the signature opposite to the seal? She says, "I presume that it was the signature appearing opposite the wax seal; but I took too little notice of the paper at the time he signed to speak positively to the particular signature then written by him." The other witness, Mrs. Alder, is unable to carry the case so far as this; she cannot recollect, for her memory, she says, is very bad, and she defers to the recollection of her daughter; but, as far as her recollection serves her, she says Mr. Charters signed last. Neither of the witnesses heard any allusion to, or knew any thing of, the codicils.

JULY 22.

Ollive v. Weak.

These witnesses, therefore, at least, do not prove the execution of the will on this occasion by the deceased, by his signing his name in their presence, and their afterwards attesting it. True, he produced the will to them, with the name, "Thomas Charters," signed, in the first instance, upon it at the time, and if that had been the only signature upon it at that time, this would have been a sufficient virtual acknowledgment. But there was at least another signature on the paper, and no notice was given to them as to which signature they were called to witness. It was not pointed out to them at all. "This will was re-signed and executed because the two former Emersons was dead. T. Charters:" was that the signature they were to attest? I am of opinion, with respect to the re-execution of 1843, that it is not established to have been done in conformity with the Statute.

Then there was another re-execution in August, 1844, respecting which Mrs. Prince deposes to this effect: "He brought the will again into the same room where papa and mamma and I were sitting; he told us he was sorry to trouble us again, but that he had made some alterations in his will, and that he hoped we would sign it again. On this occasion also we all three, mamma, myself, and Mr. Charters, signed our names to the will, and in each other's presence, and, as I believe, in the same order as before,—that is, Mr. Charters being the last of all three to sign. There was nothing written in our presence, as I believe, but our three

JULY 22. several signatures. Nothing further passed respecting the will than what I have mentioned. Mr. Charters again took possession of it, when it was signed. He did not on this occasion either point out or allude to the two codicils on the fourth side or page of the will, and I have no means of saying whether they were then on the will or not." The will being again produced to her, she deposes: "I did not take sufficient notice at the time to be able to say positively which was the signature of Mr. Charters written on this occasion. I feel sure that he signed but once, and that he was the last of the three who signed, and therefore I think the name 'Thomas Charters,' occurring in the words 'Witnesses to the above signature of me Thomas Charters, this 5th day of August, 1844, at Kentish Town,' written under our signatures, was his signature on that occasion, though my impression is that he wrote only his name. I remember that there were lines, ready pencilled, on which we wrote our signatures, and my impression is so very strong that Mr. Charters signed but once, and *that* after us, that I cannot think that his signature, 'Thomas Charters,' written above our names to the words 'I here acknowledge to have altered the 17th and 23rd lines of the second page of this my last will, and placed my initials each end, thus, T. C.' was what we saw him write on this occasion. I have no recollection that there was any blotting-paper applied to the signatures after they were written, and therefore I do not see how he could have written that signature last referred to without smearing ours; for I feel almost sure he did not sign until after us, and I know that there was no interval between the writing of our several signatures; we signed one directly after the other." And the other witness, her mother, deposes to her impression that Mr. Charters signed last, though her recollection, she says, is not so correct as her daughter's.

Not sufficient. Is there any thing to shew which signature of the deceased, made at the time, the witnesses were called to attest? Then can I say that there was a re-execution in August, 1844, any more than in October, 1843? The Court could not grant probate of the papers on the evidence of the

witnesses, and I have nothing at all on the face of the paper or otherwise to supply any deficiency in their recollection of what took place. I cannot pronounce that there was a due re-execution of the will at either of the two dates, and that renders it unnecessary to enter into the question whether the two codicils, as they are termed, form part of the will, and I give no opinion upon that part of the case. I am of opinion that the will was not duly re-executed either in October, 1843, or August, 1844, and therefore I pronounce against the validity of the codicils. But I go farther; I must pronounce for the will as originally executed, for the re-execution is not proved. There are alterations in the will, and the presumption is that they were made after the execution, and, as they are not duly attested, I am of opinion that I must pronounce for the will as originally executed in the presence of the Emersons, as appears from the paper itself. I pronounce against the codicils propounded, and decree probate of the will without the alterations made in it since the 19th September, 1840.

JULY 22.

Ollive v. Woals.

Codicils pronounced against.

Probate of the will as originally executed.

Proctors :—*Fox*, for the executor; *W. Townsend*, for the legatee.

JULY 23.

GODFREY v. HUGHES.—*Act on Petition.*—This was a business of granting Administration (with will and codicils annexed) *de bonis non* of the goods of the Most Honourable Barbara Dowager Marchioness of Donegal, who died in the year 1829, having made a will and two codicils, and, according to the tenour of the will, appointed her sister, Mary Godfrey, spinster, sole executrix and residuary legatee for life; and she, by her will, disposed of the residue of her estate and effects, after the death of her sister, in manner following :—"At the death of my sister Mary, I give and bequeath all the property I die possessed of in remainder to my dearest niece, Barbara Godfrey, subject to the annuity of £150 a year, as before named, to my sister Philly; but if my niece Barbara should be married at the time of my sister

Where a testatrix had bequeathed her property to her sister, M., for life, and at her death, in remainder to her niece B., subject to an annuity to her sister P., "but if her niece B. should be married at the time of her sister M.'s death," then, at her sister M.'s death, to her sister P.,

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*Godfrey v.
Hughes.*

for life, in remainder to relations :—Held, that the limitation of the bequest to the niece B., being a condition precedent, not subsequent, was not in general restraint of marriage, and, the niece B. having married during the lifetime of the sister M., the next of kin, in remainder, were entitled to administration and to the property.

Mary's death, I in that case bequeath my property at the decease of my sister Mary to my sister Philly for her life, and in remainder to the most deserving and those who may want it most amongst our nearest relations." In February, 1830, Mary Godfrey proved the will and codicils, and for some time intermeddled in the effects of the testatrix, and died in 1842, intestate, leaving some part thereof unadministered. Barbara Godfrey, during the lifetime of Mary Godfrey, intermarried with, and is now the wife of, the Rev. John Hughes, clerk. The Act on Petition, on behalf of Captain John Godfrey, nephew of the Marchioness, having alleged these facts, submitted that, in consequence thereof, the residue of the effects of the testatrix became, on the death of Mary Godfrey, vested in the testatrix's sister, Philippa (in the will called "Philly") Godfrey, for her life; and alleged that, in June, 1842, Letters of Administration, with the will and codicils annexed, of the unadministered effects of the testatrix were granted to the said Philippa Godfrey, as the residuary legatee for life substituted in the will; and that Philippa Godfrey is also dead, leaving some part of the effects of the testatrix still unadministered; it submitted that, according to the true construction of the will, the residue of the estate and effects of the testatrix is now divisible amongst her next of kin; and alleged that Captain John Godfrey was nephew of the testatrix, and one of the persons who would have been entitled in distribution to her personal estate, in case she had died intestate, and prayed administration, with will and codicils annexed, of her effects left unadministered to him. On behalf of Mrs. Barbara Hughes (heretofore Godfrey), the Act submitted that, in consequence of her marriage in the lifetime of Mary Godfrey, the residue of the testatrix's estate, on the death of Mary Godfrey, did not become vested in the testatrix's sister, Philippa Godfrey, but vested, at the time of the testatrix's own death, in Mrs. Hughes (then Barbara Godfrey), subject to Mary Godfrey's life-interest therein, as also to the annuity of £150 to Philippa Godfrey for life; the limitation over, in the event of Barbara Godfrey (now Hughes) marrying in the lifetime of Mary

Godfrey, being null and void in law ; and prayed administration (with will and codicils annexed) *de bonis non* of the effects of the testatrix to Mrs. Hughes, as the absolute residuary legatee substituted in the will.

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Jenner, Dr., for Captain Godfrey.—I submit that the limitation over, in the event of Barbara Godfrey's marriage, is not a condition in restraint of marriage, but only a provision made for this lady until she did marry, to continue for so long a time as she remained single. It is not, therefore, a condition in restraint of marriage, but as to the time she was to enjoy the property, which, if unmarried at Mary Godfrey's death, she was to possess, but, if she had married, was to go to Philippa Godfrey. In *Morley v. Rennoldson*,* decided by V. C. Wigram, all the authorities are mentioned, and the Vice-Chancellor said that a gift until marriage was a good limitation, and differed from a condition that a party shall not marry. This is simply a limitation until marriage. *Gillet v. Wray*.† As to the bequest in remainder "to the most deserving and those who may want it most amongst our nearest relations," it may be said it is void for uncertainty ; but the Court of Chancery will not so hold. I submit that it should go amongst the persons entitled under the Statute of Distributions. *Gower v. Mainwaring*.‡

JUNE 25.

ARGUMENT.

Addams, Dr., for Mrs. Hughes.—The limitation over is in restraint of marriage and unreasonable, and therefore void. This has been held in various cases. In *Hartley v. Rice*,§ Lord Ellenborough said, "On the face of the contract, its immediate tendency is, as far as it goes, to discourage marriage, and we have no scale to weigh the degree of effect it would have on the human mind;" and Grose, J., said, "Any contract in restraint of marriage is illegal." It is argued that the bequest in this case is not a general restraint of marriage, but "until" marriage. But it is a bequest to her niece Barbara during the time she remained single, and then there is a bequest over. Is not this a limitation in general restraint of marriage? "I give it to you during the

* 2 Hare, 570.

† 1 P. Wms. 294.

‡ 2 Vez. 87, 110.

§ 10 East, 22.

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 —
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time you remain single, and if you marry, I give it to somebody else." It is a condition that, up to the death of Mary, she must remain single; it is unreasonable in point of time. As to the second point, I do not contend that the bequest in remainder is void for uncertainty.

Jenner.—The case of *Hartley v. Rice* was that of a wagering contract that the party would not marry within six years.

Cwr. adv. vok. PER CURIAM.—This is a question which, perhaps, belongs to another jurisdiction, and I wish to look at the cases before I decide it. It is admitted on all sides that a limitation in general restraint of marriage would be void; but there may be cases in which there is no general restraint; and in this case the testatrix appears to have been desirous of doing what is not a very unreasonable thing for her to do, namely, keep the property in her own family, and not let it go to another family. I am provided with the opinion of a very learned gentleman of the Chancery Bar, who considers the question one of some difficulty; he is of opinion that the condition is not in restraint of marriage. [*Addams.*—There are two opinions.] Yes, and that increases the difficulty in this case. I think there are cases which go into very nice distinctions.

July 23.
 JUDGMENT.

SIR H. JENNER FUST.—This question is one which has undergone investigation in the Courts of Equity, to which of late years it has more properly belonged, and many of the cases have turned on nice points of distinction; and the Court may find itself placed in some degree of difficulty, considering how seldom it can have questions of this kind come to be decided in this Court; for although it is true that the doctrine was originally borrowed from the Civil Law, yet it has been considered that the jurisdiction of the Ecclesiastical Courts has not been admitted to the full extent in Courts of Equity.

All general restraints upon marriage are void by the law and practice of Courts in this country, as against the policy of the law, but, as I said, very nice distinctions have been drawn as to the circumstances under which the limitation

may be considered good, and a great part of the discussion in these cases has turned upon the question whether the condition is precedent or subsequent, and different considerations seem to apply to these two states of things. Where it is subsequent, it operates in the nature of a penalty, as a forfeiture; in the case of a condition precedent, it must be shewn that the party is in a situation to claim what is contended for by law.

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Now Mrs. Barbara Hughes is to take the bequest of the residue after Mary Godfrey's death, subject to an annuity of £150 to her sister Philippa, but it was not the intention of the deceased that she should have this benefit if she happened to be married at the time of Mary's death; it was her intention that the bequest should then go over in another form. Now, is this a condition precedent or subsequent? I apprehend a condition precedent, for she never became possessed of the property; she never enjoyed any part of the property, nor did it become vested in her until she was in a situation to claim the legacy, namely, surviving Mary Godfrey, and being unmarried at the time; and I have already stated that, in many of these cases, there are nice points of distinction raised as to the effect which limitations of this kind will have.

The condition
 is precedent.

One of the most learned discussions on the question arose *Scott v. Tyler*. before Lord Thurlow, in 1787, in *Scott v. Tyler*,* in which a very long and learned discussion took place as to the effect of certain conditions with respect to a marriage of the party. It was argued by very learned Counsel,—by Mr. (afterwards Sir James) Mansfield, Mr. Alexander, Mr. Hardinge, Mr. Scott, and others, upon the several points. Amongst other things, there was a sum of £10,000 given to a putative daughter in several events; one moiety at twenty-one, in case she should be then unmarried; the other moiety at twenty-five, if then unmarried; but if she married before twenty-one, with consent of her mother, then the whole to be paid to her; but if she should die before twenty-five, the £10,000 was given to the mo-

* 2 Bro. C. C. 431.

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ther, to whom there was also a gift of the residue generally. The daughter married under twenty-one, without consent.

It was argued that this was a condition in restraint of marriage, and consequently could not be supported. It is in vain to go through the arguments, for they are extremely long; but Lord Thurlow, in disposing of the case, put it in this form (p. 488): "It was not contended, on the part of the daughter, that, if the bequest had been when at twenty-one or twenty-five, in case she was unmarried, without more, she could have claimed the legacy; but, because the mother was empowered to accelerate the gift by consent, it is argued to be, indirectly, an illegal restraint of marriage." If the daughter married without the consent of the mother, before twenty-one, it was a forfeiture of the claim for this legacy to be paid to her. "I am," he says, "of opinion, that the daughter, having married at eighteen, improvidently, as far as appears, and against the anxious consent of the mother, never came under the description to which the gift of the £10,000 South Sea Annuities was attached; it is, therefore, void, and part of the residue, and belongs to the assignees of the mother." It is not necessary to go further into that case; but it is clear it was not argued, on behalf of the daughter, that, if the bequest had been at twenty-one or twenty-five, in case she was unmarried, without more, that would not be a good limitation. It is true there was a particular period fixed for the payment of the legacy,—the age of twenty-five; here is no such fixed period; it is at the death of the sister Mary, when the legacy is to vest in the niece, if she continued unmarried at that time.

The case of *Scott v. Tyler* has been followed by a vast number of other cases, which are mentioned in one referred to in the Argument,—that of *Morley v. Rennoldson*, reported in 2 Hare, 570. I am going to read the case from the *Jurist*,* as containing some of the decisions in the cases.

Morley v.
Rennoldson.

There was a sum of money given to the testator's daughter Margaret, and he directs the manner in which the property was to be managed for her. If Margaret should die

without leaving any child who, being a son, should not attain twenty-one, or, being a daughter, should not attain that age, or be married, then the residue was bequeathed over. Then he afterwards made a codicil to that will, to this effect: "In consequence of the nervous debility under which my daughter Margaret R. is labouring (originally occasioned by a fright at the age of five years), and considering that it totally unfits her for the control of herself, I deem it advisable, for her better protection and of the several legacies and bequests to her by my said will, to direct that my trustees and executors shall apply all moneys bequeathed to my said daughter for her use and benefit in such manner as they shall think fit, and the most for her comfort and welfare; and my will and mind is, that, for the reason aforesaid, my said daughter Margaret shall not at any time contract matrimony;" and he directed that, in case of the marriage or death of his daughter Margaret, his trustees and executors should apply the residue for the benefit of other persons. The daughter intermarried with Robert Linkson, and a question arose between Margaret Linkson and her husband, and the parties interested under the ulterior trusts of the will, as to the true construction of the codicil. The case was argued for the different parties, and the authorities bearing on the case were adduced in the Argument. The Vice-Chancellor, in disposing of the case, stated that the bill was filed by some of the executors, who were trustees under the will, and Mr. and Mrs. Linkson were defendants, Mr. Linkson being one of the trustees under the will, who had since married the testator's daughter, Margaret. He says: "The trustees suggest that, in consequence of Margaret's marriage, a question has arisen, whether she is entitled to the life-income of the fund, or whether that life-interest has not become forfeited, and gone over to the legatees after her marriage. An answer has been put in by Mr. Linkson and Margaret his wife, in which they state that although Margaret had suffered some time from nervous debility, yet that she has perfectly recovered her health, and is equal to the control of herself, and insists that this codicil is to be considered as merely *in terrorem*, and as void

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by the law, as a general restraint of marriage." It was held by the Vice-Chancellor that it was a void condition; that it was a "conditional gift in restraint of marriage, by which a party sought to cut down an interest, which interest he had given by will, and which was to take effect under the will." The history of the law on the point he thus stated: "The rule of the civil law was referred to in the *Argument*, that all restraints of marriage are void. Whether it was a condition precedent or subsequent, whether a general restraint or a particular restraint, they all appear to have been declared void. In the English law, as it is to be collected from Lord Thurlow's opinion, in *Scott v. Tyler*," the case to which I have referred, and which is reported more fully in 2 Dickens, 712, "the rule has not been followed in that respect. A marked distinction is taken between a condition precedent and a condition subsequent, and a marked distinction also as to whether it is a particular restraint (a partial and reasonable restraint), or whether it is a general restraint; and this point is also made to depend upon the question whether there is a gift over, or no gift over. I think there is a case, of *Stackpole v. Beaumont*,* which is referred to in Mr. Jarman's Treatise,† in which Lord Loughborough appears to have said, 'that the state of the authorities was such, that any judge might decide in any case in any way he liked, as the decisions were as various almost as the subjects of them.'" That certainly does render the case more easy for this Court. "There are some points, however," he proceeds, "which seem quite clearly settled, according to the law as administered in Courts of Justice in this country. One is that, if the restraint is a general restraint, and the condition is subsequent, then the condition is altogether void, and the party retains the interest given to him, independently of the condition: that is, the law supposes a gift of a certain duration, and any attempt to abridge it by condition in restraint of marriage is discouraged by law." That is, if he gives an interest in a sum of money, residue, or whatever it may be, and the parties be in possession of it,

* 3 Ves. 89.

† Vol. I. p. 837.

then the legacy becomes absolute, and the condition is void, being a condition subsequent. He goes on: "Until the Argument of this case, I had certainly understood that this distinction was taken in the Courts of this country, that if the property is limited to a person until she marries, and when she marries then over, that limitation was good." Why, then, if a property may be given to a person with a limitation until her marriage, and then over, where is the difference between this and giving a legacy at a certain time, provided she is unmarried? I cannot see any distinction in substance between the two cases. Suppose it had been a bequest by a person having three nieces, and all these nieces, at the time of making the will, were single, and suppose she was to say, "I give to my eldest niece unmarried at the time of my death:" would that be an invalid condition? Certainly not, if Mr. Vice-Chancellor Wigram is justified in what he says, that "if property is limited to a person until she marries, and when she marries then over, that limitation is good." He says: "It is very difficult to understand how it could be otherwise, because, in that case, there is nothing to give an interest beyond the marriage." There is nothing, in this case, but that she should succeed Mary, and be unmarried at the time—"If you suppose the case of a gift of a larger interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the larger gift in operation." That is in the particular case of *Morley v. Rennoldson*, which he was then deciding: if you give the daughter a greater legacy, to be paid under certain circumstances, and then attempt to abridge and qualify it, by directing that she shall forfeit it if she marry, then the limitation would be a condition subsequent, not precedent, and that condition would be void, and the bequest would be absolute; "but," he says, "if you give it until marriage, there is nothing to carry the gift beyond that point. Upon looking into the authorities, I find no reason to found my judgment upon the supposition that a gift until marriage, and when the party marries, over, is not a valid limitation according to the law of this country. In the case of a widow, there is no question about it. It was decided in

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Jordan v. Holkham,* that a condition that a widow shall not marry is good, and an annuity given during widowhood is also good. *Barton v. Barton*.† My only doubt arose from *Scott v. Tyler*, in which Lord Thurlow observed upon the state of the law and upon the civil law, and made use of this expression: 'An injunction to a widow to keep in a state of widowhood is a lawful condition.' But that was a peculiar case, a case standing by itself; but in speaking of the civil law, he says, that, according to Godolphin, 'The use of a thing may be given during celibacy, for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage;' therefore affirming the general doctrine, that a gift until marriage would be perfectly good. On referring to the case of *Low v. Peers*,‡ I find that Lord Chief Justice Wilmot there goes through the cases upon the subject, and most distinctly shews that, according to his apprehension of the law, a gift until marriage is perfectly good, and the limitation over is perfectly good. He notices the case of college fellowships, of customs of manors, of limitation of estates during celibacy, and the express distinction between limitations and conditions, and he remarks, that that distinction is recognized and established, and that the common law allows it. However, I do not found my judgment upon that. I may refer to the cases, and amongst them to the later case of *Bird v. Hunsdon*,§ to which I was referred, and *Marples v. Bainbridge*,|| as affirming the same proposition. In those cases, all the reasons the Court referred to were quite superfluous, if a limitation during celibacy is not good. The Court took what I may call the short course, when they said the restraint was not good. I wish to exclude the supposition, that I intend to proceed upon that ground." Then he proceeds to the next question, namely, whether the codicil, in its true intent, was to be considered as confirming the gifts of the will, and then seeking to determine them by marriage; or whether it

* Amb. 209.

† Wilmot's Ca. 370.

|| 1 Madd. 590.

† 2 Vern. 308.

§ 2 Swans. 343.

was not a complete substitution of new bequests, amounting, in fact, to a limitation during celibacy.

That seems to be the latest case on any of those points which bear strongly upon the present. The deceased here gives the property in remainder to her sister Mary for life, and then to her dearest niece Barbara; "but, if my niece Barbara should be married at the time of my sister's death, I in that case bequeath my property" so and so. Here is, then, a bequest to her, after the death of Mary, under certain circumstances, if the party remain unmarried. This is a condition precedent, not subsequent; not forfeiture, but a condition that must be performed before the party can become entitled to the benefit; therefore it is a condition precedent, which is subject to different considerations from those that apply to a condition subsequent. Is there any thing unnatural in this, that Barbara, continuing unmarried, should have the residue of the property; but that, if she married before receiving payment, then the deceased should wish to keep the benefit among her own relations? On the contrary, it appears to me reasonable. It is not a general restraint of marriage; she is to be in these circumstances before she is entitled to this property. It is not a forfeiture in case of marriage after the property had been vested. May not this be according to the law as understood in the Court of Chancery? I can only collect that law from those cases to which I have referred, and the judgment of Sir James Wigram, in which he holds that a gift until marriage may be good, and a limitation over, in such case, perfectly good; and that the party to whom it is limited over will be entitled to the benefit of it, there not being, in such case, a general restraint of marriage.

This doctrine was acted upon in the present case, in the first instance; because, after the death of Mary, Mrs. Hughes being married, administration was granted to Philippa Godfrey. She, I apprehend, must have taken the administration, with the will and codicil annexed, of the unadministered goods, as the residuary legatee for life; that must have been the form in which it was granted to her, for that is the only form in which she could be entitled to it. It is

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Application
of the doctrine
to this case.

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tion to the next
of kin.

very true that this passed according to the view taken of it in the Registry ; but still, unless I was satisfied that this grant was an improper grant, I should be unwilling to overthrow it ; I should be unwilling to disturb an act of that description, unless I was satisfied that the party to whom it was granted was not entitled to it in the character in which she took it. I am not satisfied of that ; my strong impression is the other way. I look upon this case to be in the same situation as if this had been a bequest to a party until she married, and then limited over to other parties ; and such a limitation over would, according to the case I have referred to, be a good and valid limitation, under these circumstances.

Therefore, I am of opinion that Mr. John Godfrey is entitled to administration as one of the parties in distribution. There is no question raised as to the qualification respecting the persons in remainder, who are to be the poorest and most deserving ; no question arises upon that ; it is a simple question whether Mrs. Hughes is entitled to the property as residuary legatee, on the death of Mary, or whether the next of kin are entitled to the property, and therefore to the grant. Mr. Godfrey is as nearly related to the testatrix as Barbara is ; he prays administration to be granted to him, and I am of opinion so to decree. I decree administration to Mr. John Godfrey as nephew and one of the next of kin of the deceased, and, as such, one of the parties entitled in distribution.

Proctors :—*Jenner*, for the next of kin ; *Jellicoe*, for the asserted residuary legatee.

Cav. Day.

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A letter, signed by the deceased, but not attested, containing testamentary directions to the persons to whom it was addressed.

IN THE GOODS OF ALEXANDER HALLY, DEC.—*Motion, ex-parte*.—The deceased died at Madeira, 24th January, 1847, a widower, leaving a son ; his personal property amounting to £2,000. Probate was sought of two papers in the deceased's handwriting. One (A) was in the form of a letter, dated " Madeira, 9th September, 1842," and ad-

dressed at the beginning "William Grant and Edward Lewis, Esqrs.," and it commenced thus: "Dear Sirs, Although at present in sound mind and apparently good health, yet the recent irreparable loss I have met with, by the death of my adored wife, is so preying on my spirits, that it is probable that I may not be long in this wicked world. Should you survive me," and he then goes on to beg them to take the administration of his affairs, and to "liquidate," with the advice and consent of his son and heir (then a minor), his property to the best advantage. He then directs what he desires to be done in regard to his property, and the letter concludes "Yours most truly, Alexr. Hally." The paper is indorsed "To William Grant and Edward Lewis, Esqrs. Only to be opened in the event of my death. A. Hally." This paper was not in any way attested.

The other paper (B), dated the day preceding his death, was to the following effect:—

In addition to Mr. William Grant and Mr. Edward Lewis, nominated in my will as my executors, I hereby nominate and appoint, as joint executor with them, Mr. Alfred Wilkinson, merchant in this island of Madeira. Signed by me this 23rd January, 1847, before these witnesses, Robert Innes, merchant, and Dugald McKellar, physician, both residing in this city of Funchal, island of Madeira.

A. Hally.

X

Rich. Innes, witness.

D. McKellar, witness.

The affidavit of the subscribed witnesses proved the due execution of the last paper (B); that both the papers were found together in an iron safe at the office of the deceased, sealed up, and were opened by her Majesty's Consul at Madeira; and that no other testamentary paper could be found amongst the deceased's papers.

Haggard, Dr., moved for administration with both papers (A and B), as together containing the will of the deceased, to the son, the executors having renounced. The paper (B) is duly executed, and there is a sufficient reference therein to the other paper (A) to identify it. The testator mentions

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Hally, dec.

ed; and a paper, regularly executed by him, and attested, referring to "the executors nominated in his will," being the same persons named in the letter, this former paper not having been produced to the witnesses, nor annexed to the latter (though both were found together sealed up in the deceased's repositories) — admitted as the will and codicil of the deceased.

Aug. 3. the persons whom he had nominated executors in the former paper,—though not expressly so nominated, they must be taken to be executors of his will,—and he joins another person with them.

Hally, dec.

DECREE. **SIR H. JENNER FUST.**—The difficulty is, that the paper (A) was not produced to the witnesses who subscribed the paper (B). The question simply is, whether the codicil executed the day before the deceased's death is sufficient to convert the latter into a regularly executed will. It is not a question of incorporation. Now the intention of the deceased is perfectly clear, and I think, under the circumstances, I may hold these papers to be the will and codicil of the deceased, the will not having been attested (being only signed), and the codicil being regularly attested, and referring to the other paper as his will—there is no other paper which it can refer to;—and, the executors having renounced, I decree administration to the son. The papers were not annexed together at the time.

Moore, Proctor.

A paper, intended by the testatrix to be a codicil to her will, but described by the writer, through misapprehension, as her "last will and testament," confined to real property, not revoking the previous will and codicil, nor appointing executors, nor disposing of the personalty,—admitted to probate as a codicil.

IN THE GOODS OF PRISCILLA LANGHORN, WIDOW,
DEC. — Motion, ex-parte.—The deceased died 9th June, 1847, having duly executed her will, dated 20th September, 1841 (appointing two executors), and two codicils, dated respectively 2nd May, 1842, and 8th June, 1847. The latter paper was executed under the following circumstances. The deceased having expressed to T. P., yeoman, a wish to give her house and orchard (freehold) to Mary D., wife of George D., without stating whether she desired to make a will or codicil, he thereupon wrote the paper, beginning "This is to certify my last will and testament," and disposing of that property, which paper he read over to the deceased, who approved of it, and executed it in the presence of him (the writer) and another person, both present at the same time, who subscribed the paper as witnesses. The paper so executed T. P. took to his own residence for security, and (as he deposed), on considering the paper the

day after the execution, he was led to believe that he had committed an error by omitting the words "that this is," after "certify," and he thereupon, at his residence, inserted the aforesaid words, "that this is," without the instructions or knowledge of the deceased. The paper consequently now read: "This is to certify *that this is* my last will and testament,"—the words "that this is" being interlined. The paper contained no clause of revocation, no appointment of executors, and no disposition of property beyond that of the freehold house and orchard.

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Langhorn, dec.

Addams, Dr., moved for probate of the papers as the will and two codicils of the deceased. The paper was misdescribed through error; the deceased had no intention to revoke her will and first codicil; the words, incautiously inserted by T. P., after execution, are of no effect.

SIR H. JENNER FUST.—The paper relates to freehold property only. I think this was only a misdescription by the party who wrote the will. There is no revocation of the previous papers, and no re-disposition of the personal property. There was a case,* the other day, where the testator referred in a codicil to one will instead of another. It is very different where the disposition is of the whole property, real and personal; but here only, real property is disposed of. The question is, whether the paper of the 8th June, 1847, is to operate as a revocation of the will and the other codicil, the only ground being the words in the paper, "This is to certify, my last will and testament." I think it is clear that this was a misdescription of the paper by the writer, who did not know of the will and former codicil, and who, it appears, added the words "that this is" after the execution. These words must be omitted from the probate.

Motion granted.

Motion granted.

Toker, Proctor.

IN THE GOODS OF THE REV. WILLIAM HALE, DEC.—Where probate of a will had been ob-

Motion, ex-parte.—In this case, which has been several

* *Payne v. Trappes*, ante, p. 478.

AUG. 3.

Hale, dec.

tained by the universal legatee and sole executrix on a false representation that she was a spinster, whereas she had a husband living, the Court refused to alter the probate without the consent of the husband, the property not being bequeathed to the sole and separate use of the legatee.

times before the Court, the testator, who died in 1846, had separated from his wife Elizabeth, in 1802, and in 1837, without knowing whether she was living or dead, contracted a *de facto* marriage with Elizabeth B., he being described as a bachelor and she as a spinster. In 1843, he had a will prepared, intending thereby to leave all his property to this person, but fearing that, if she were described as his wife, his first wife (bearing the same name of Elizabeth) might claim the property, he caused her to be described in the will, by the name E. B., as his "housekeeper," appointing her universal legatee and sole executrix. In Michaelmas Term last, a Motion was made* for probate to be granted to her under the name and description of "Elizabeth Hale, the widow and relict of the deceased, formerly E. B., spinster;" because, if she took the grant as E. B., in the character of executrix, she would repudiate her marriage, which was probably good, and be liable to ten per cent. legacy duty. The Court, however, having no evidence that the first wife was dead (of which fact the testator, at the date of the will, was doubtful), refused the Motion. Very special advertisements were then published, but no intelligence could be gained respecting the existence or death of the first wife, and in Hilary Term the Motion was renewed;† but was still rejected, and probate was taken by her under the name of E. B., spinster, in the character of sole executrix. It now appeared that her spinster name was really Lloyd; that she was married prior to her contract of marriage with Mr. Hale, E. B. being her married name, and that her husband, S. C. B., who was living at the time of her pretended marriage with the testator, still survived.

MOTION.

Addams, Dr., now moved the Court to decree the probate to be altered, by striking out the word "spinster," and inserting the words "wife of S. C. B."

DECREE

SIR H. JENNER FUST.—It is clear that the misdescription has not been through error, but that there has been a fraudulent description of this person throughout. As a mar-

* *Ante*, p. 258.† *Ante*, p. 259.

ried woman, she contracts a marriage with Mr. Hale, describing herself, under her married name, as a spinster, and knowing that she was the wife of another person; she takes probate of the will as a spinster, after endeavouring to obtain it in the character of the widow of Mr. Hale, and now the Court is called upon to decree the probate to be altered, and to grant it to her as the wife of S. C. B. I want to know whether S. C. B., the husband, knows any thing of the matter, and whether he is willing that his wife should take probate. The property is not given to her sole and separate use. I shall not decree probate to her without the consent of her husband, and I should be glad to know why the name of the husband has been concealed from the Court, and why this woman should come to the Court and ask for probate as a spinster. [*Addams*.—The husband is aware of this application.] It may be so. I shall not direct the probate to be altered at present. A fraud has been practised upon the Court. I shall reject the Motion.

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*Hale, dec.*Motion re-
jected.*Pownall, Proctor.*

IN THE GOODS OF ABRAHAM SAYER, DEC.—*Motion, ex parte*.—The testator died in June, 1847. On the 21st May, he requested J. S. S. to prepare a will for him, who thereupon obtained a printed form, for the bequest of personal property in trust, and, after filling up the testator's name at the commencement, and the name of L. S. and his own, as the persons to whom the property was to be bequeathed in trust, not being acquainted with the mode of making a will, he then struck through that part of the form which began "upon trust to pay," &c., on the first side (where the dispositive part of the will should have been written), and, after inserting the names of L. S. and himself in the blank on the second side, as executors, and the date in the concluding paragraph (not filling up the blanks in the printed attestation-clause, but adding the word "witness" at the bottom of it), he asked the deceased to whom he wished to leave his property, and from his dictation, wrote the follow-

Where a will had been written on a printed form, misunderstood by the writer, who inserted the dispositive part after the conclusion of the will, according to the printed form,—the Court admitted the paper.

AUG. 3. ing words on the third side, the form concluding on the
Sayer, dec. second side :—

To pay to Mr. B.'s children £5, that is, £1 to each ; to my brother E. S., the half of my property, and the remainder half to be equally dived [*sic*] between my brother J. S., Mary S., and Laban S.

This was signed by the deceased, and attested by two witnesses, the date, "May 21, 1847," being inserted between their names. An asterisk appears on the first side, where the erasure begins ; but there is no corresponding mark or reference on the second side.

The property was under £200.

MOTION. *Addams*, Dr., moved for probate to the executors, L. S. and J. S. S. The difficulty has arisen from the use of a printed form : still, it is submitted, there is a good execution of the will.

DECEASED. **SIR H. JENNER FUST.**—This is one of those unfortunate cases in which parties are misled by writing a will on a printed form. However, in this case I think we may get out of the difficulty better than in other similar cases. The form begins "This is the last will and testament of me," &c. ; then it directs the payment of debts, &c. by his "executors hereinafter named ;" it then bequeaths all his estate and effects to the two persons who were to be trustees, directing them to collect and convert into money all his real and personal estate, "upon trust to pay,"—and then are blanks to be filled up ; but all this part, beginning "upon trust," is struck out, and there is in the left-hand margin an asterisk by way of reference to something appearing elsewhere. It then goes on to nominate and appoint executors, the blank being filled up with the names of the two persons before mentioned ; and it concludes, "In witness whereof, I, the said A. S., have to this my last will and testament set my hand the 21st May, 1847." That would be the conclusion of the will ; and then follows the attestation-clause, but the blanks in it are not filled up. On the next, or third side, is a disposition of the property, signed by the testator and

attested by two witnesses. Now the first question is, where does the will end? On the second side or the third? If the second side is not to form part of the will, then a difficulty would arise as to the appointment of the executors. [Addams.—That is immaterial.] Then let administration with will annexed pass of all the first side of the will down to the mark of reference, excluding all that follows on the printed form after the mark of reference, and including what is on the third side. The persons named in the first part of the will are not executors according to the tenour; administration with will annexed must, therefore, be taken by the brothers, as residuary legatees in trust.

Rothery, Proctor.

Aug. 3.

Sayer, dec.

Administration with part of the will.

WINTLE AND DOWDING v. FORD AND OTHERS.—Cause. This was a business of citing the parties interested in a pretended will, with a codicil, of Mr. William Slack (both papers bearing date the 30th June, 1845), to propound the same. None of the parties appeared but Stephen Ford, named one of the executors and a joint residuary legatee, and the proceedings went on against the other parties *in pœnam*.

The will is to the following effect:—

This is the last Will and Testament of me, William Slack, of the Parish of Bathwick, Bath, Esquire. In the first place, I direct my debts, funeral and testamentary expences, to be paid by my Executors herein-after named. And whereas I am desirous of rendering some benefit to the City of Bath and Bristol, where I have resided nearly all my life, and having no near Relatives, and none whom I know or acknowledge as such, I have determinid to dispose of my property in manner following mentioned (that is to say I give unto the Bath General Hospital funds or Trustees the sum of five hundred pounds, and I like give the sum of five hundred pounds to the Bath United Hospital funds or Trustees, and I also give unto the Bristol General Hospital funds or Trustees the sum of five hundred pounds) and I also give unto the funds, Trustees or Managers of the Bath Victoria Park, in Trust, the sum of five hundred pounds, to be laid out or expended for improvements in the said Park, from time to time, in such ways

A will and codicil, propounded by a party, as executor and joint residuary legatee, taking a large interest under the will, suing *in forma pauperis*, pronounced against, the circumstances of the transaction shewing fraud and conspiracy.

Will propounded.

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and manner as the said trustees, Treasurers or Managers of the said Victoria Park shall think most expedient for the benefit and comfort of the inhabitants and visitors of Bath who frequent the said Victoria Park, and I direct my said Executors herein-after named to pay unto Henry James Garland, the son of Frances Garland, my housekeeper, one annuity or yearly sum of fifty pounds, for and duering the term of his natural life, by quarterly payments, on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and twenty-fifth day of December in every year, and the first payment thereof to be made on such of the said days as shall first happen after my death, and I also direct my said Executors to pay unto Mr. Coldsworthy one annuity or yearly sum of Fifty pounds in like manner for and duering his natural life, and I also give unto Henry John Mant, Esquire, Solicitor, No 2 Wood Street, Bath, the sum of five hundred pounds. and I also give unto Thomas Barter, Surgeon, Oxford Buildings, Bath, the sum of Two hundred pounds. and I also give unto Esna Shurne Baker, of No 3 Quiet Street, Bath, the sum of two hundred pounds, for his kind attention to me duering the many years I had my Office at his house, and I also give unto Sarah Fidler, of the Parish of Colerne, in the County of Wilts, Widow, the sum of two hundred pounds. and I also give unto Isaac Gifford, of Swainswick, my Tenant, the sum of four hundred pounds. and I also give unto Joseph Wyatt and John Vincent, Clerks to Frederick Dowding, Solicitor, Bath, the sum of one hundred pounds each. and I also give to the Minister and Churchwardens for the time being of the Parish of High Heaket, in the County of Cumberland, the sum of two hundred pounds, in trust to be distributed amongst the poor of the said Parish of High Heaket within two years next after my death. and I also give to the Minister and Churchwardens for the time being of the Parish of Colerne, in the County of Wilts, one annuity or yearly sum of twenty pounds for ever, upon trust to be distributed by them amongst the poor of the said Parish of Colerne in such ways and manner as they shall think most fit, and to such persons as shall not be receiving parochial aid. and I direct my said Executors herein-after named out of the rents and profits of my real and personal estate herein-after bequeathed and devised to them, to pay and make provisions for the payment of an annuity or yearly sum of eight hundred pounds, given by the Will of my Brother, Samuel Slack, Esquire, to his Widow, Mrs. Phebe Slack, of Lamb-bridge, Bath, for her life, on the days and times mentioned in my

Brother's will. and I particularly desire that such payments may be punctually made, so as to prevent any inconvenience to her by delay. And I also give, bequeath, and devise unto Frances Garland, my beloved housekeeper, her executors, administrators and assigns, the sum of three hundred pounds per annum, for ever; and also all my Furniture, plate, linen, China, and other household effects, and every other article, whether for use or ornament or consumption, that shall be in and about the said Messuage and Premises where I now reside, Sidney Buildings, at my death, free of duty; and I give her all the wine in No 1 Johnstone Street, and I direct that my sd executors herein-after named pay the aforesaid three hundred pounds by equal Quarterly payments to the said Frances Garland and her assigns, on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December, in every year, and the first payment thereof to be made on such of the said days as shall first happen after my death. And as to all the rest and Residuary of my real and personal Estate and Effects whatsoever and wheresoever which I shall die possessed of or intitled to, I give and bequeath and devise the same and every part thereof unto Thomas Wintle, late of Richmond Terrace, Clifton, Esquire, and now of Swainswick Villa, near Bath, and my old and respected friend Stephen Ford, of No 27 Monmouth Street, in the City of Bath, Yeoman, and Frederick Dowding, Esquire, Solicitor, of Bath, in manner following, that is to say: one equal third shear or part to the said Thomas Wintle and his respective heirs, executors, administrators and assigns, for ever, and one equal third shear or part to Stephen Ford, his respective heirs, Executors, administrators and their assigns, for ever, and one equal third shear to the said Frederick Dowding, his executors, administrators, and assigns, for ever, and shear and shear alike, as tenants in common, to and for their own absolute use and benefit. and I particularly request that my said Executors pay all and every part of the said legacies hereintofore devised as soon as possible they can make it convenient so to do, or as soon as they shall have sufficient funds for that purpose, after the payment of the four above described and devised annuities, amounting together to the sum of twelve hundred pounds per annum. and I appoint the said Thomas Wintle, Stephen Ford, and Frederick Dowding, Executors to this my Will, and hereby revoking and making void all former and other Wills or Codicils by me at any time heretofore made, and declare this writing only to be my last Will and Testament. In witness

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Signed by the Testator in the presence of us, who in his presence and at his request and in the presence of each other have subscribed our names as Witnesses

W^m Slack (L.S.)

Hen^y Mant
Jacob Studley Manning

This paper was received in the Registry of this Court, transmitted by the general post, inclosed in an envelope, addressed "Messrs. Dyneley, Iggulden, and Gostling, Deputy Registrars, Prerogative Court of Canterbury, Doctors Commons, London," accompanied by a statement of certain leasehold and other property belonging to the deceased, and by a letter to this effect:—

Bristol, Dec^r. 16, 45.

Gentelmen

I herewith enclose you as requested by Testator his *Will* within six Months after his disease you will therefore be pleased to acknowledge the recpt of same to the three different appointed executors at your earliest possible conven And Get a *Proctor* to prepare a Probate from the annexd Copy which is a discription of the property in testator's own hand writing you will be called upon to produce these documents when requesit till when I am Gentelmen

Yours &c E A

Stephen Ford, in his Affidavit of Scripts, dated 31st July, 1846, deposed that he had been informed by John Lewis and John Ford (a son of the deponent), and believed, that the deceased did, on the 30th June, 1845, after the execution of the will of that date, execute in the presence of the said John Lewis and John Ford another paper, supposed by them to be a codicil to the said will, and which paper they attested and subscribed, but which had never been seen by the deponent, nor did he know what became of the same, or where it then was. On the 15th October, 1846, a further Affidavit of Scripts was made by Stephen Ford, wherein he deposed that, since his former Affidavit was made, two papers (annexed to his Affidavit) were found, then joined

together, purporting to be and contain a codicil, bearing date the 30th June, 1845, to the will of the deceased, and that such codicil is the very codicil referred to in his former Affidavit; and he further made oath that, on the 21st September, 1846, Audley Harvey, of Bath, solicitor, accompanied the deponent to the house of Frances Garland, late the housekeeper of the deceased, and made a careful search among certain books and papers of the deceased in her custody and possession; that Audley Harvey then found the aforesaid codicil, in the deponent's presence, folded up and between the leaves of an account-book; that when Harvey so found the same, the paper whereon it is written was one sheet of paper, partially torn in the fold, but it had since been accidentally torn in two, as the same now appeared; that the deponent had on many occasions applied to Frances Garland to allow him to look over the papers belonging to the deceased in her possession, but, on account of her illness, absence from Bath, and other causes, she had not allowed him to do so until the said 21st September, 1846.

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The paper referred to is to the following effect:—

This is a Codicil to the Will of me, William Slack, of Sydney Buildings, Bath, in the County of Somerset, Esquire, which Will bears date the thirtieth day of June, 1845. Whereas I, the said William Slack, of number twenty-seven Sydney Buildings, Bathwick, in the City of Bath, in the County of Somerset, having made and duly executed my last Will and Testament in writing, bearing date the thirtieth day of June one thousand eight hundred and forty five; now I do hereby declare this present writing to be a Codicil to my said Will, and I do direct the same to be taken as part thereof, and to be annexed thereto; And I do hereby direct that my said Executors, Stephen Ford and Frederick Dowding, as named, described and appointed in and by my said Will, as two of my Executors and Residuary Legatees, do pay in addition to those legacy's named and bequeathed therein: first, I give and bequeath unto Charles Weeks, and Aron Webb, my tenants at Colerne, in the County of Wilts, fifty pounds each. and I give and bequeath unto James Jones, of Colerne, in the County of Wilts, Schoolmaster, the sum of fifty pounds, for his kind attention to me at various times. and I hereby give and bequeath unto Francis Tanner, of Colerne, late my tenant, the sum of twenty

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pounds. and I hereby give and bequeath unto Henry James Garland, in my said Will named, the further sum of two hundred pounds, in addition to what I have given him in my said Will, and I give and bequeath unto Isaac Melbourne, of Wragmere House, Low Hesket, in the County of Cumberland, the sum of Ten pounds. and I hereby give and bequeath unto Daniel Woodman, my tenant at Colerne, in the County of Wilts, the sum of five pounds. and I direct the said seven legacy's to be paid in two years next after my decease. and Whereas I did, in and by my said Will, Give and bequeath unto the trustees of the Bristol General Hospital the sum of five hundred pounds, now I do hereby revoke the said Legacy, and do give unto the said trustees or Treasurers of the said Bristol Hospital, the sum of two hundred pounds only. and Whereas, having committed to the charge of Thomas Wintle, one of my Executors, as appointed in and by my Will, my Deeds and other Papers, for him, the said Thomas Wintle, to deposit the said Deeds and Papers with Mrs Phebe Slack, my late Brother Samuel Sack Esquire Widow, and Whereas having ascertained, since the execution of my Will, of even date herewith, that the said Thomas Wintle has acted contrary to my request, desire, and my instructions to deposit the said deeds and papers with Mrs Phebe Slack, of Lambridge, as directed by me; and Whereas, in consequence of the cause thereof, I cannot place any further confidence in him, the said Thomas Wintle, as one of my Executors and residuary Legatees, as appointed in and by my Will; Now I do hereby revoke and make void to all intent and purpos all and every part of that my said Will relative to the appointment of the said Thomas Wintle as one of my Executors and residuary legatees, and I do hereby appoint the said Stephen Ford and Frederick Dowding, their heirs and their assigns, as whole and sole Executors and Residuary Legatees to my said Will. and I do hereby give and bequeath unto the said Thomas Wintle the sum of five hundred pounds only. and further I direct that my said Executors, Stephen* Ford and Frederick Dowding, and their heirs and their assigns, to act as joint tenants, and not as tenants in common, as directed in and by my Will, for ten years next after my decease. and I direct that if Mrs Phebe Slack, my Brother Samuel Slack's Widow, Demise should not take place during that period, then I further direct that my said Executors continue and act as joint tenants untill after her death, and then and after her, the said Mrs Phebe Slack's, decease to become tenants in common, as directed by my Will. and I do hereby ratify and

* Here ends the writing on the first paper.

confirm my said Will in all other particulars thereof, except where the same are hereby altered or revoked. in Witness whereof, I, the said William Slack, have to this Codicil set my hand this Thirtieth day of June, one thousand eight hundred and forty five.

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Signed, published and declared by the said Testator, William Slack, as and for a Codicil to be annexed to his last Will and Testament and to be taken as part thereof, in presence of us, who, in his presence and at his request and each others presence, have hereunto subscribed our names as Witnesses

W^m Slack.

John Lewis.

John Ford.

Hen^y Mant.

The two papers were propounded on behalf of Stephen Ford (who was admitted to sue *in forma pauperis*), in an Allegation which pleaded that the deceased gave instructions to Henry Mant (since deceased), of Bath, solicitor, or to some other person unknown to the party, to prepare his will, pursuant to which instructions, the will, dated 30th June, 1845, was drawn up and duly executed by the deceased, in the presence of the said Henry Mant and Jacob Studley Manning, who attested the same; that the deceased gave instructions, in like manner, to Henry Mant, or some other person, to prepare a codicil to the aforesaid will, pursuant to which the codicil of the same date was prepared, duly executed, and attested by John Lewis, John Ford, and Henry Mant; it pleaded the death of Henry Mant on the 26th September, 1845, and that he was a person of good faith, credit, and reputation; it pleaded that Jacob Studley Manning, the other subscribed witness to the will, was a friend of the testator, and occasionally visited him, and was occasionally seen by personal acquaintances and tenants of the deceased, and was particularly seen at his house on the 30th June, 1845; that diligent search and inquiry had been made, and all proper steps taken, to ascertain the residence of the said Jacob Studley Manning, without effect, and the party was unable to obtain any informa-

1846.

Oct. 17.

Allegation
propounding
the papers.

Ava. 3. tion respecting his handwriting and good character; that
Wintle v. Ford. the deceased, whilst living, expressed a wish to Messrs. Wintle and Dowding, or some other person, that his will should not be read or proved, nor his affairs administered, until six months after his death; it pleaded the transmission of the will to the Registry in December, 1845, and that the paper enclosed in the envelope, containing an account of the deceased's property, is of the handwriting of the deceased; that the party is unable to set forth of whose handwriting is the writing of the envelope and letter, and he had endeavoured to ascertain, but was unable to set forth, by whom the will and papers were forwarded to the Registry, or in whose custody the will remained between the time of the deceased's death and the 17th December, 1845; that, at and after the deceased's death, certain of his books and papers were left in the custody of Frances Garland, his housekeeper, in his house in Bath, which books and papers were subsequently removed by Frances Garland to her house in Bath, and that on the 21st September, 1846, the party (Stephen Ford), accompanied by his solicitor, Audley Harvey, and Henry Wyatt, made search amongst the aforesaid books and papers, at the house of Frances Garland, and that Audley Harvey found, between the leaves of one of the books, the codicil propounded, and it exhibited the book.

1847.
 Jan. 15.
 Counter-
 Allegation.

On the part of Messrs. Thomas Wintle and Frederick Dowding, who opposed the papers propounded, as executors named in a prior will of April, 1845, an Allegation was brought in and admitted, which pleaded as follows :—

That the deceased died a bachelor, without any but very distant (if any) relations; that he had carried on the business of a linen-draper, in partnership with his late brother, in Bath and Bristol (in the former of which cities he had lived nearly all his life) until 1816, when they retired from business, having made considerable fortunes, but which they held under assurances (deeds and conveyances) made to them in common, and their funded property was invested by them in their joint names; that the deceased, for the last ten years of his life, occupied a small house in Bath, and cohabited with Frances Garland, his housekeeper, but who sometimes assumed to be his wife and passed by his name; that he lived

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there a very secluded life, neither receiving visitors nor transacting business at his house, but renting a room or office for such latter purpose in another house, where he kept his account-books and papers (other than his title-deeds), and at which room he saw his tenants, and all others (in general) on matters of business; that, on the 9th February, 1842, he executed a (draft) will, which Mr. Dowding (party in this cause) prepared for him from his instructions, and which draft will had been in the deceased's possession for some time before; that when so executed, he gave it to Mr. Dowding for safe custody, who kept it until the 17th August, 1842, and then, at his request, delivered it up to the deceased, who kept it from such time uncanceled until early in the year 1843, when he cancelled it by tearing off the seal and signature, still keeping it, however, in its cancelled state; that between the 9th February, 1842, and April, 1845, the deceased had various conferences on the subject of his will with Mr. Dowding, who, on the 11th March, 1842, had prepared and submitted to him a new draft will, drawn from his instructions; that, on being taken ill of his last illness, in April, 1845, the deceased sent for Mr. Dowding, and (on the 11th April) delivered to him the executed but cancelled (draft) will of 9th February, 1842, and also that of April in that year, from which and some further instructions then given to him by the deceased, Mr. Dowding prepared a will, which was duly executed by the deceased on the 16th April, 1845, on which day he also executed a codicil; that he afterwards executed three other codicils, dated respectively 24th April, 1845, 13th May, 1845, and 26th June, 1845, to his said will; that on Sunday, the 29th June, 1845, the deceased, then very ill, expressed to Mr. Dowding a wish to bequeath his trust and mortgage estates to him and Mr. Wintle, and Mr. Dowding, pursuant to his instructions, prepared a further codicil to his will for that purpose, also embodying therein (pursuant to the deceased's instructions) the contents of the last previous codicil of 26th June, 1845, and on the following day (30th June, 1845) the deceased executed such further codicil, at the same time cancelling, by tearing off the seal and his signature therefrom, the codicil of 26th June, 1845; that the deceased never made and executed the pretended will and codicil propounded (each dated 30th June, 1845); that the signatures, "Wm. Slack," at the foot of those papers, are not those of the deceased; and it exhibited various letters bearing his genuine signature, shewing, upon comparison, that the signatures "Wm. Slack," subscribed to the papers propounded, were not written by the same person who wrote the names "Wm. Slack" to the exhibits, but were in a feigned hand-

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writing; it pleaded that the names "Henry Mant," subscribed to the papers, as attesting the execution, are not of the handwriting of Mr. Henry Mant, of Bath, solicitor, alleged to be an attesting witness, and exhibited various letters bearing his genuine signatures; it pleaded that neither Mr. Henry Mant, nor Jacob Studley Manning (if there is any such person), nor John Lewis, nor John Ford, pretended attesting witnesses to the papers, was at the deceased's house on the 30th June, 1845; that the deceased neither left home on that day (being too ill to do so), nor was visited at home by any person whatever, save the attesting witnesses to the codicil prepared by Mr. Dowding, and Sarah Racker, a neighbour; that the only inmates of the house on that day were Frances Garland, Charlotte Parfitt (the deceased's regular servant), and Sarah Miles, a little girl had in to assist, in the room of the deceased's other regular servant, who had left shortly before; that Sarah Racker was with the deceased from about one o'clock in the day to about eight o'clock in the evening of the 30th June; that Charlotte Parfitt never left the house on that day, save on some errands from about six to about seven o'clock in the evening, and that she returned thereto before Sarah Racker quitted, and no person could have visited the deceased on that day unknown to Charlotte Parfitt or Sarah Racker; that Mr. Dowding, who is a solicitor of Bath, had been well known to the deceased for many years, and his confidential solicitor since 1840; that the deceased consulted him on all matters of business and in the management of his property, and had been frequently heard to express his confidence in and regard for him, as well as Mr. Wintle, who was formerly concerned with the deceased in business; that the deceased, on the 17th June, 1845, told Mr. Wintle that he had had all his books and papers fetched away from his office in Quiet Street, and had selected such as appeared useful, which (excepting some account-books and a file of bills and receipts) he requested Mr. Wintle to place in an iron safe in the house of his late brother's widow, wherein all his title-deeds had been kept for many years, and in the course of the day Mr. Wintle took away the books and papers so selected (among which were no deeds, except a common lease or two), and on the following morning deposited them in the safe aforesaid; that from the 17th June to Saturday the 28th, inclusive, Mr. Wintle saw the deceased daily, or on most days; that on the 1st July, he again called upon him, and finding him much worse, remained with him during that day and until three o'clock in the morning of the 2nd, when the deceased died; that Stephen Ford (party in the cause) was occasionally employed by the deceased in

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executing distresses for rent and other matters of a similar nature, but with whom he never associated on a friendly footing, and for upwards of a year preceding his death, he had prohibited Stephen Ford and all his family (with whom Frances Garland was on a friendly footing) from coming at all to his house; that on the 28th June, the deceased, having been told by Frances Garland that Stephen Ford had sent to inquire after him, and to ask if he might come and see him, said "No, I don't want to see him; I have nothing for him;" that the papers propounded and the letter signed "E. A.," transmitted with the will to the Registry, were written by Daniel Ford, a son of Stephen Ford, and it exhibited various letters written and signed by Daniel Ford, alleging that, upon a comparison of handwriting, it would appear that the pretended will and codicil were written, though in a feigned or disguised hand, by the same person who wrote the exhibits; that John Lewis, another subscribed witness to the codicil propounded (and who was alleged to be a confederate with Stephen Ford, and his sons, Daniel Davis and John, and Frances Garland, in setting up the papers propounded), held as a tenant of the deceased a house and lands at Colerne, Wilts, in respect of which he was upwards of two years in arrear for rent at the deceased's death, and for which and rent since accruing, Messrs. Wintle and Dowding, on the 1st October, 1846, distrained on his land for £865; that on the following day, John Lewis, accompanied by Mr. Henry John Mant, as his solicitor, called upon Mr. Dowding to complain of such distress, and produced two pretended receipts, purporting to have been signed by the deceased, and balancing his rent account up to Midsummer, 1845, and upon such receipts being challenged by Mr. Dowding as forgeries, they were abandoned by John Lewis, who had since suffered the whole sum of £865 to be levied; that on the day of and after the deceased's funeral, several of his tenants assembled at a tavern in Bath, John Lewis and John Ford being present; that Mr. Wintle told the tenants that, for the present, things would go on as usual, and as soon as he had left the room, John Ford said that something would be soon produced that Mr. Wintle knew nothing of, and that a fly had been sent for him, to take him to the deceased's house late at night on the Monday before he died, and that he and his brother, Daniel Davis Ford, had then and there witnessed a will for the deceased, and went on to mention the effect of such will, of which statement, though made in his hearing, John Lewis took no notice; and with reference to what is pleaded in the adverse Allegation, as to the deceased having expressed a desire that his will should not

Aug. 3. be proved for six months, it alleged that the deceased did express a wish to that effect to Mr. Wintle and Mr. Dowding, in the presence and hearing of Frances Garland, giving as his reason that it would be more convenient to them not to prove it before, as by such time they would have funds in hand to meet demands.

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Witnesses were examined on both Allegations; and on publication of the evidence, the Proctor for Stephen Ford (the pauper) declined to proceed further in the cause.

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ARGUMENT.

Stephen Ford, the party, being called, and appearing, Addams, Dr., for the opponents of the papers, characterized this case as one of gross fraud. The story in support of it was *felo de se*; there was no account of the custody of the will, or by whom it had been sent to the Registry. In short, it was one of the grossest frauds ever attempted, and which had been persisted in up to the present time. The Court must pronounce against the pretended will and codicil, and decree probate of the genuine will and four genuine codicils, condemning Stephen Ford (in order to mark its sense of the transaction) in the costs.

Robertson, Dr., was heard on the same side.

The party being asked whether he had any thing to say, said he believed the will to be a good will; that Mr. Slack meant him to have somewhat; and that his son had gone to Liverpool, to endeavour to find the person who had witnessed the will.

JUDGMENT.

SIR H. JENNER FUST.—(After stating the case, the contents of the papers, and the manner in which they came to light.)

The papers, it is stated, were prepared by Mr. Mant, who, it is admitted, was a professional person of respectability; but it is somewhat extraordinary that such papers as these should have been prepared in the office of any professional gentleman. According to the evidence, Mr. Mant had retired from business five or six years before the transaction in question, though since his retirement he seems to have acted for some insurance office. Now it so happens that, the will having been prepared by Mr. Mant, and attested by him and by Mr. Jacob Studley Manning, the

Court can receive no information from either of these gentlemen, as to what is supposed to have taken place at the period of the execution of the will, for Mr. Mant is dead (having died about three months after the deceased), and Mr. Jacob Studley Manning is not forthcoming: endeavours have been made, it is said, to find him out, but without effect, and advertisements have been inserted in the newspapers, requesting him to come forward or information respecting him; but unfortunately no such person is forthcoming to give an account of what took place at the execution of the instrument to which his name appears subscribed as a witness. The question then is, how is the Court to get at any information as to the preparation and execution of this will, neither of the subscribing witnesses being present to give any account to the Court?

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The history of the deceased, for the purpose of this cause, is a very short one. He had carried on business, as a linen-draper, at Bath, with his brother, who died in 1840. It appears by the evidence that, shortly after the death of his brother, the deceased conferred and advised with Mr. Frederick Dowding, as his confidential solicitor, and in the course of his communication with him, some instruments were prepared by him and executed by the deceased; one in February, 1842, which was executed in draft; another in April, 1845, and two codicils to that will in the same year and month, and another codicil on the 13th May, also of that year, and on the 26th June another codicil to the will was executed by the deceased, which he afterwards cancelled on the 30th June, on executing another codicil, in which were embodied the contents of the cancelled codicil of the 26th June. These are not unimportant dates, the will and codicil propounded, which bear date on the 30th June, containing a totally different disposition of the property from that contained in the will prepared by Mr. Dowding and the codicils to it. Mr. Wintle appears from the book of accounts to have had some connection in business with Mr. Slack, or some dealings with him; and there is no doubt that he was on terms of confidence with the deceased, as well as Mr. Dowding. Mr. Slack had a person residing with

History of
the deceased.

Aug. 3. him, named Frances Garland, as his housekeeper, and who
Wintle v. Ford. occasionally assumed the name of Mrs. Slack, but no marriage had taken place between the deceased and this lady, and they did not live on very affectionate terms, or at least she did not treat him with much affection; there were quarrels, and she acted with great personal violence, of which, it appears, Mr. Slack complained. She, however, resided with the deceased until his death. He was suffering for some time under a painful disease, the nature of which does not exactly appear; but on the 30th June, it is clear from the evidence that he was in an extremely weak and debilitated state; and yet it is equally clear that he was in entire possession of his mental faculties to the last; for on the day on which he is alleged to have executed this will and codicil, the 30th June, two days before his death, he executed a codicil to the will of April, 1845: so that there can be no doubt, from the evidence of witnesses on both sides, that the deceased was in possession of mental capacity. The question, therefore, turns upon the *factum* of the instruments,—whether, in point of fact, they were executed by the deceased. The whole case depends altogether and entirely upon the evidence, and upon the credit to be given to the evidence, of John Ford and John Lewis, because they are the only persons who can speak to the facts supposed to have taken place as to the preparation and execution of the papers.

Evidence in support of the papers.

Now John Ford, the first witness, is the son of Stephen Ford, an executor and joint residuary legatee with Messrs. Dowding and Wintle, under the will, and John Lewis is a tenant of the deceased, and with respect to whom there seems to have been considerable dispute and difference of opinion as to the amount of rent due from him to the deceased, which it is not necessary to refer to; but the evidence shews that he is not a person upon whose evidence the greatest reliance is to be placed. However, these two persons depose that they were present at the execution of the will. I assume that the codicil of the 30th June, executed in the presence of Messrs. Wyatt and Veale, is admitted to be the act of the deceased; there is no doubt of the execution of that instrument, which was executed in the noon

of the 30th June; the codicil propounded is said to have been executed at a later period of the day, and consequently it would revoke, if valid, what had been done before on that day.

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Now what is the account which John Ford gives of himself, and of what took place on the occasion? He states that he was very intimate with the deceased, who was constantly in and out at his father's house at Bath, and that he (the witness) used to collect rents for the deceased. He says that the deceased, on the 30th June, 1845, asked him to take a note to Mr. Mant, saying, "I have given Mr. Mant instructions to prepare a will for me, and I want him to come as quick as possible." In his answer to an interrogatory, this witness states that the deceased said, -he had expected that it would have been ready for execution on the 28th. The witness says he delivered the note and message, and on his return to the deceased's house (in about three or four hours), he found Mr. Mant, Mr. Lewis, and another gentleman, whom he knew by sight, but not by name, sitting with the deceased. He then deposes to the execution of the will, and the attestation of it by Mr. Mant and the other gentleman, whom the deceased addressed as "Mr. Manning," and speaks to various circumstances, and identifies the paper by the peculiarity of the seal, and from the writing of the attestation-clause being "touched up" by Mr. Mant.

According to this statement, it should seem that the paper had been brought prepared by Mr. Mant (who is found at the deceased's house between one and two o'clock), according to the directions given to him by the deceased; though certainly the paper does not bear on the face of it the appearance of having been prepared by Mr. Mant, or by any person in his office. Indeed, Mr. Henry Wyatt, who has been examined to prove the handwriting of Mr. Mant to the papers, says it is very unlikely that he should have prepared such a will for the deceased without keeping the instructions for or draft of it; and certainly I must think it is very improbable that a paper of this kind should have come out of the office of a solicitor of eminence, like Mr. Mant. The

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manner in which the residue of the property is designated as "the rest and *residuary* of my real and personal estate and effects;" and the mode in which the word "share" is spelt, "shear," and other errors, shew that the paper must have been written by a person not very competent to put in legal form and phraseology the disposition of property by will to so large an amount, and of such large and valuable interests as this paper purports to dispose of. The form, therefore, of the paper itself, and the account given by John Ford as to its preparation, are most important evidence, and it is rendered more so by the conduct imputed to Mr. Mant, who, according to the story of this witness, was so forgetful of his duty to his client that, on the very evening of the day of execution (the will was not read over in the presence of the witnesses), Mr. Mant informs this John Ford of the substance of the whole will: I say that, on the face of the paper and of the evidence, the story is so improbable, that the Court must have more satisfactory evidence than that of John Ford before it can pronounce for the validity of such an instrument, under any circumstances.

But the case does not stop here; for, immediately after the execution of the will, the deceased chooses (according to Ford's account) to have some alterations made in it: some legacies were omitted, and upon Mr. Mant suggesting that the alterations might be made by a codicil, "the deceased pulled out a piece of paper, very closely written on both sides, from a small memorandum-book, and said, 'I should like it to be made according to this paper.'" Thereupon, Mr. Mant took the paper, left the room with it, and returned with a paper, which he gave to the deceased, who read it, and said he intended to make some further alterations; he then gave another paper, containing such alterations, to Mr. Mant, who again left the room, and returned with the codicil, which was signed by the deceased, and subscribed by Mr. Lewis, the witness (Ford), and Mr. Mant; and he identifies the paper as that propounded.

The reason assigned by the deceased, in the paper, for revoking the appointment of Mr. Wintle, as executor and joint residuary legatee, is, that he had desired Mr. Wintle to

deposit certain deeds in the possession or hands of Mrs. Phebe Slack, his brother's widow, which he had ascertained he had not done, and that they were at Mr. Wintle's house ; and that is the reason assigned for the execution of the codicil, so far as Mr. Wintle is concerned. And it is stated in the evidence of the witness Ford, that the directions for the revocation of Mr. Wintle's appointment were given after the instructions for the first part of the codicil had come from the deceased. In answer to an interrogatory, the witness says, that the interval between the execution of the will and of the codicil was about two hours ; that Mr. Lewis and the deceased were occupied in some business conversation, and a great deal passed about the possession of some title-deeds, respecting which the deceased appeared very angry ; that when Mr. Mant returned, the deceased said, " I have ascertained that my deeds have not been delivered to Mrs. Phebe Slack," and Mr. Mant handed to the deceased a note, saying, " This note I have received in answer to my inquiry respecting the deeds, and it confirms it." Now that note ought to have been produced. He says that the deceased then took a piece of paper, wrote on it, and handing it to Mr. Mant, said, " That paper contains the further alterations I wish to have made immediately," and added, apparently very much excited, " I will take care that Mr. Wintle shall not deceive me any more." The witness then says that the deceased took possession of the will and codicil, wrapped a piece of paper round both, and left them on the table. Now this part of his evidence bears, I think, very much upon the fact as to the place where the paper was found ; it was not found wrapped round with a piece of paper, nor was it found with the will, but it was found in a book of accounts ; and it is to be recollected that, at this time, the deceased was in a very weak state ; that he could sign the papers (according to the evidence of other witnesses) with great difficulty, and was raised up to sign his name to the other codicil, though he has signed it with a considerable degree of firmness ; so that it is a fact which must not be left out of consideration, as it has an important bearing on the depositions given by this witness, that, according to his

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Aug. 3. account, the codicil, when executed, was wrapped up in a piece of paper, and left upon the table.
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The account which the witness Lewis gives of the paper is pretty much to the same effect, with some difference as to the time of the transaction. Lewis appears to have been a tenant of the deceased, and the account he gives is, that he called upon the deceased in the afternoon of the 30th June, for the purpose of arranging a money transaction respecting his farm. He says he found there Mr. Mant and Mr. Manning, sitting with the deceased, who was reading a paper, which paper was signed by him in the presence of Mr. Mant, another gentleman, John Ford, and himself; and that, at the deceased's request, Mr. Mant and Mr. Manning (the other gentleman) attested it. Not having signed this paper, he says it is difficult for him to identify it, except that "the seal is wonderfully like." This seal seems to have made a great impression upon both these witnesses, and this witness likewise notices a peculiarity about the attestation-clause, Mr. Mant having, he says, after the execution, passed a pen over some part of the writing—a very improbable circumstance, considering who Mr. Mant was. He gives pretty much the same account, therefore, as the other witness, and the evidence of this witness and Ford is, as I said, all we have to rely upon, as to the will, deprived as we are of the testimony of the attesting witnesses by the death of Mr. Mant, and by the second witness not being forthcoming.

With respect to the codicil, this witness (Lewis) says, "the deceased, almost immediately after the execution of the will, said, 'I want to make alterations, and give further legacies,' and on Mr. Mant's suggesting a codicil, the deceased gave him a paper out of a little book, saying, 'These are the alterations I wish for,' and when Mr. Mant left the room with the paper, the money business, about which I called, was transacted between myself and the deceased, and we made an arrangement about the payment of some tithes; this brought up the subject of the deeds of the farm and other landed property at Colerne. I told him that his title-deeds were at Mr. Windle's; he appeared angry at this, and

immediately wrote down something, and when Mr. Mant returned, he said, 'I hear my deeds are at Wintle's;' Mr. Mant said 'Yes, they are.' The deceased, getting still more angry, said, with great warmth, 'Mr. Wintle has deceived me before upon some money affair; he shall not do so again;' and giving him such writing as he had made before Mr. Mant came back, he added, 'I shall have it altered in this manner, and I wish this done immediately.' Mr. Mant left with this paper." He then identifies the paper, and upon interrogatory deposes pretty much to the same effect as Ford.

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The evidence of these two persons goes to establish both the will and the codicil as the act of the deceased; but the whole story is of a most improbable nature. That Mr. Mant was ever employed by the deceased there is no other evidence before the Court; that Mr. Dowding had been his confidential solicitor for many years is established beyond a doubt; and that there had been frequent communications between the deceased and Mr. Dowding from the year 1842 to 1845 the evidence is abundant, shewing the confidential nature of their conferences together, and there is evidence beyond all doubt of the execution of a will in 1842, of a will on the 16th April, 1845, a codicil to that will on the same day (16th April, 1845), of another on the 24th April, of another on the 13th May, of another on the 26th June, and on the 30th June of the execution of another codicil to that will, the will of April, 1845. Under any circumstances, the evidence of these witnesses, Ford and Lewis, would not be sufficient to satisfy me that their account of the transaction is to be relied on, laying out of consideration the evidence given to the Court by other witnesses; but when we come to look at that evidence, and at all the circumstances connected with the disposition of this large property, I say their story is improbable and inconsistent. It is utterly improbable that the deceased should, on the 26th June, 1845, have executed a codicil confirming his will of the 16th April, 1845, and the codicils of April and May, and that on the 30th June he should have executed a will for which he had given instructions prior to the 28th June, the very day (the 30th June) when the

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codicil of the 26th June was cancelled and embodied in a codicil ratifying and confirming the will of April and the codicils thereto. With all these circumstances before it, can the Court believe for one moment that the deceased acted in the manner he is represented to have done? For, according to the account given by Ford, as I have said, the instructions for the will of the 30th June (the paper propounded) must have been given before the 28th June, because on the 28th June it was, according to the evidence of Ford, that Mr. Mant ought to have been there, at the deceased's house, with the will ready for execution. I say, it is utterly impossible, upon such evidence as this, to pronounce for the validity of these papers; there must be corroborative evidence. Let us see what corroborative evidence there is.

There is the evidence, in the first place, of Sarah Miles, who came to act as servant at the deceased's house on the 29th June, the other servant having left on the 28th. What evidence does she give in support of the transaction? First, she says that, on the day in question, the 30th June, when she was living at the deceased's house, a gentleman called, "whom she had often before seen in the streets at Bath," and walked into the room where the deceased was, whom she heard say to him, "How do you do, Mr. Mant?" This witness was examined in May, 1847, when she was twenty-three, so that she must have been then twenty-one; she never heard Mr. Mant's name before, though she knew his person, and she recollects that "Mant" was the name by which that person was called by the deceased. She says, on the same day, in about a quarter of an hour after, another gentleman called at the deceased's house, and Mr. Mant met him at the door of the room in which the deceased was, and said, "How do you do, Mr. Manning?" She says she is otherwise quite unacquainted with Mr. Manning, whom she had never seen before, and never saw since. So that this witness recollects, after a period of two years, these two gentlemen calling upon the deceased, whose names she had not known before, and that the name of the one was "Mant," and that of the other "Manning;" and this is to support the account that Mr. Mant and Mr. Man-

ning were in the house of the deceased on that day. This witness goes on, in answer to an interrogatory, to say that, on the 30th June, 1845, she was employed in the deceased's house, temporarily, as housemaid; a part of her duty was to attend to the door; that about twelve o'clock she let in Mr. Mant, and about a quarter of an hour afterwards, Mr. Manning; at about a quarter past one she let in Mr. Lewis; that about, or directly after this, Charlotte Parfitt left the house, and did not return until four or five o'clock. It is a very convenient thing that Charlotte Parfitt should have happened not to be at home at that particular time, so that these persons could not have been seen by her. The witness goes on to say that, just as Charlotte Parfitt was going out, or (directly after she had gone, Mrs. Garland told her (the witness) to leave the street-door open, which she did; that about two o'clock John Ford came, and walked in, the door being open; that about half past three she saw Mr. Mant in the passage, going from the drawing-room, where the deceased was, to the front parlour.

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Now, assuming all this to be so, there would be something like a corroboration of the evidence given by the two witnesses, Ford and Lewis; but it turns out that two other witnesses have been examined,—Mrs. Racker and Charlotte Parfitt,—who give a different account of the matter. Charlotte Parfitt or Mrs. Racker was all day in the house, one or the other, or both, from the morning of that day,—Parfitt until four or five o'clock in the afternoon, and Mrs. Racker, according to her own account (and there is no reason to doubt its accuracy, except from the evidence of Miles), was within doors during the whole of the afternoon. True, there is a discrepancy between the evidence of Charlotte Parfitt and Mrs. Racker as to the time when Mrs. Racker entered the house; for Mrs. Racker says she went about one o'clock, and this is contradicted by Charlotte Parfitt, who says it was not until four or five o'clock that Mrs. Racker came, and from that time she remained during the whole of the afternoon, and until nine o'clock. That is certainly a discrepancy between the evidence of these two persons; which is correct, the Court has no means of discovering; but one or other of

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Aug. 3. these witnesses was in the house during the whole day. The account given by Mrs. Racker is, that she called at the house at about one o'clock, and remained there until half-past eight o'clock in the evening, and that "no person could possibly have been with or seen the testator unknown to her between the hours of one o'clock and eight;" that no person did call, and that it is quite impossible that the transaction described by Ford and Lewis could have taken place without her being aware of it. This witness states, in answer to an interrogatory, that she is certain as to the day on which she was at the deceased's house. She does not know at what time on that day Messrs. Veale and Wyatt (who attended the deceased, and attested the codicil to the will of April, 1845, at noon of the 30th June) were at the house; but the other witness, Charlotte Parfitt, deposes that, on the 30th June, "Mr. Wyatt called, and another gentleman with him, who was, I think, Mr. Veale, both of them being clerks to Mr. Dowding;" so that she confirms the evidence of Mr. Wyatt, who proves that the codicil was executed at noon on that day. Parfitt states that on the 30th June the testator was "very ill indeed," and that the only persons who called upon him that day were a person who brought a note from Mr. Dowding, Mr. Dowding's two clerks, and Mrs. Racker. She says: "I stayed in the house all day, and if any one called on that day I must have known it. I left the house at seven o'clock in the evening, and was away till eight or nine; but from the morning up to seven o'clock in the evening, nobody could have come into the house without my knowing it, and no one but those I have already mentioned did come." As this witness was in the house all the day, until seven o'clock in the evening, she must have known if any person came to the house. She is not aware of Mrs. Garland's having given orders that the street-door should be left open at an hour of the day when, from the evidence of Lewis, the execution of the will took place; she knows nothing of such an order; but she says if any person had come to the house, she must have known it, and that no such persons did call. She says: "As I now best recollect, it was nothing like so early as one o'clock that

Mrs. Racker called at the house ; the time at which she arrived was five o'clock, and she stayed there till nine:" so that there is this difference between these two witnesses as to the time ; but, as I said, one or the other of them, or both, was in the house during the whole day, from the morning until nine o'clock in the evening, when Mrs. Racker left.

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Now looking at the evidence of Messrs. Wyatt and Veale, as to the execution of the codicil to the will of April, on the 30th June, and at the evidence of Charlotte Parfitt, as to Messrs. Wyatt and Veale coming there that day, and at the evidence of Mrs. Racker, I have no doubt of the truth of what is deposed to by these witnesses, and that no other persons came there that day, and that neither Mr. Mant, nor Mr. Manning, nor Mr. Lewis, nor Mr. Ford was with the deceased on that occasion. It is impossible that the two accounts can consist together ; it is impossible to reconcile the transaction deposed to by Ford and Lewis with that deposed to by Messrs. Wyatt and Veale ; it is incredible that a codicil executed that very morning should be revoked by the execution of a will so prepared, and executed with so many suspicious circumstances connected with the transaction. The will itself is not proved to my satisfaction to have been executed by the deceased on the 30th June, 1845, and no valid reason is assigned why it should have been so soon altered. After Mr. Wintle had been appointed one of the executors and a joint residuary legatee with Mr. Dowding and Stephen Ford, that appointment was to be revoked because Mr. Wintle had not done what the deceased had directed should be done, namely, delivered some deeds, which had been given into his possession, to Mrs. Phebe Slack. Why, as far as the Court can trace, this had been done three weeks or a fortnight before ; the deeds had been removed, as I understand the evidence, to the house of Mrs. Phebe Slack, and deposited in a strong room or safe, to which place the deceased had free access after the papers had been brought back. Then I say the reason itself fails ; there is no ground which the Court can see for the act done by the deceased, so far as Mr. Wintle is concerned, and the whole complexion of the story has an air of improbability.

Inconsistencies and improbabilities of the case.

Aug. 3. *Wintle v. Ford.* Mr. Wintle, having been desired by the deceased to remove certain papers, retains them, it is said, in his own possession, and does not deposit them in the hands of Mrs. Phebe Slack. And yet the deceased continues his confidence in Mr. Wintle, and his communication with him; for it is proved that he was in communication with him up to and after the 30th June, 1845, the day when the codicil propounded was executed, and there is no evidence of any act on his part by which the confidence of the deceased was likely to have been withdrawn from him; for, as far as the evidence goes, the deeds had been deposited with Mrs. Phebe Slack, and were not in the possession of Mr. Wintle. There may have been some papers which were not deposited there. The book which has been brought in (No. 9) was brought from Mrs. Garland's house, and the codicil propounded was found on the 26th September, 1846, in that book, by Mr. Harvey, in the presence of Mr. Henry Wyatt. But who placed it there? How came it there? The presumption, it may be said, is, that it was placed there by the deceased himself. But when could he have done it? The deceased, we are told, took the will and codicil into his own possession, when they were executed, and wrapped a piece of paper round both, and left them on the table. It is true, he may afterwards have separated one from the other, and placed the codicil in a book (for what reason, however, does not appear); but, to be sure, from the appearance of the paper, I should much rather suppose that it had been kept and carried about for some time in the pocket, than deposited in a book; and if the deceased did place it in the book, it must have been done on the 30th June, or on the 1st of July, for he died early in the morning of the 2nd. If this had been done, Mrs. Garland must necessarily have been acquainted with it; she was constantly about the deceased, attending upon him. So that the whole story is full of improbabilities.

Evidence as to handwriting. Still, improbable as the story may be, there might be proof of the handwriting of the deceased, and of the handwriting of Mr. Mant; but unfortunately all the evidence as to handwriting is the other way. It is true, when Mr. Henry Wyatt (who had been in the employ of Mr. Henry

Mant, and is a clerk to his son) is examined to prove the handwriting, he swears that he believes Mr. Mant's name to be his writing—that is, when examined in chief; but when he is called to depose to the handwriting upon interrogatory, and several other signatures of Mr. Mant are produced, and the differences between them and the signatures to the will and codicil are pointed out to him, he will not take upon himself to swear that these are of the proper subscription of Mr. Mant, but he believes they are not: and he is the only witness to prove the handwriting upon whom any reliance can be placed. Amongst the witnesses on the other side, Mr. Vincent and others swear that they disbelieve the signatures to the will and codicil to be the handwriting of the deceased; and there is the evidence of other persons, Mr. Netherclift and Mr. Clarac, gentlemen skilled in handwriting, who depose that the signatures of the deceased and of Mr. Mant are both fictitious, and that the signatures of Mr. Mant to the will and the codicil were not made by the same person, and the same with regard to the signatures of the deceased. All the proof upon this point is one way: there is nothing but the evidence of these two persons, Ford and Lewis, that they saw the deceased sign his name to the papers, and that Mr. Mant attested the execution.

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The whole story on one side is consistent and probable,—that the deceased executed a codicil on this 30th June, confirming his will of April, 1845; and here, on the same day, is this other transaction of a totally contrary character, that is, the making of a will and codicil by which a great alteration is made in the disposition of the property, in the appointment of executors, and in the disposal of the residue of the property. The papers, it is pretended, were prepared by a solicitor of eminence (who had left off professional business generally); but they are written in such a manner as no professional person would have written them in, or suffered them to be prepared. So that the story is improbable in itself, and inconsistent. Who is Stephen Ford, and what is Stephen Ford? He had been employed by the deceased in certain matters connected with his property, having been in the habit of serving processes for him, and he had kept a public

Aug. 3. house, and was certainly known to the deceased, and the deceased appears to have given him small sums by way of charity. He occasionally came to the deceased's house, but if he took a meal there, it was with the servants in the kitchen, and not with Mr. Slack himself and his house-keeper, Mrs. Garland; and it cannot be contended that the credit and character of this person are established before the Court to be such as that the Court could place any reliance upon them, as supporting the probability of the transaction. What is the Court to do, under these circumstances, with this evidence as to handwriting before it,—which is all one way? And although the witness John Ford says he does not expect any advantage from the establishing of these papers, and although Mr. Lewis's statement concerning his rent may be correct, they are not persons who come before the Court with that degree of credit which entitles their evidence to be received as proof of a case so inconsistent with facts. The real question for the Court to determine is, not whether there has been a conspiracy in this case, but whether the evidence is adequate to what the case demands; though I think it is impossible not to see that the case is one in which a gross fraud has been attempted to be practised, and that the parties have laid themselves open to an indictment for a conspiracy;—I have no doubt it is so. The Court is not bound to find out by whom the papers were written, or who wrote the names of the deceased and of Mr. Henry Mant, subscribed to them; the Court is not bound to do it, though it may form a pretty strong conjecture by whom it was done. But the question, and the only question, for the Court to decide is, whether these papers are proved to be the last will and codicil of the deceased, executed by him with an intention that they should have effect, and that the names of Mr. Mant and the other persons, Lewis, Ford, and Manning, were subscribed to these papers as attesting the execution of them; and I say that there are circumstances to shew that, from the beginning to the end, there is no truth in the transaction. And as to the declaration which Mr. Fidler speaks to, that the deceased said he would provide for Stephen Ford for the rest of his life,—is that a

The case set
up untrue;

sufficient ground why Ford should take half of the residue of this large property, and be an executor, the executor displaced to have £500 only? What ground is there to shew any intention on the part of the deceased to make this person, Stephen Ford, his executor,—that he held him in so much respect as that he should supersede Mr. Wintle in the execution of his will? I am at a loss to conceive a case more improbable altogether. I say that the will of April, 1845, and the codicils to it, are established beyond all doubt, and that the will of the 30th June and the codicil are not established as being the act of the deceased; on the contrary, I think they are proved not to be the act of the deceased: and, under these circumstances, I am of opinion I must pronounce against the validity of the will and codicil propounded in this cause; and I should proceed further, to condemn the individual who propounded them in the costs, notwithstanding that he has been admitted a pauper; but I do not think, under the circumstances, that it is necessary for the Court to go to that extent against this individual. If other individuals had been before the Court, the Court would undoubtedly have done so, for I am satisfied that this is an attempt to impose upon the Court, and to palm upon it a will and codicil of which the deceased had no knowledge whatever. I content myself, therefore, with pronouncing against the will and codicil propounded, and decree probate of the other will and codicils to the executors.

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and based upon
 fraud.

Papers
 propounded
 pronounced
 against.

Proctors:—*Puckle*, for Messrs. Wintle and Dowding; *Currey*, for the pauper, at the beginning.

END OF TRINITY TERM, AND OF THE SITTINGS
 AFTER TERM.

MICHAELMAS TERM, 1847.

Archep Court of Canterbury.

1st Sess.

NOVEMBER 2.

In a cause of office promoted against a Clerk in Holy Orders, who was suspended from office and benefice for a certain period, and until he produced a certificate satisfactory to the Court of his conduct during the suspension, and was also condemned in the costs; at the expiration of the period of suspension, upon the exhibition of a satisfactory certificate, although the costs had not been paid, the Court relaxed the suspension.

THE OFFICE OF THE JUDGE PROMOTED BY BROOKES THE YOUNGER v. CRESSWELL.—*Motion.*—This was originally a proceeding against the Rev. Henry Cresswell, vicar of Green St. Michael, Somerset, for quarrelling and fighting, swearing and using profane and indecent language, frequenting public houses, and habitually drinking to excess. The Court (February 12, 1846) held that the Articles were sufficiently proved, and sentenced Mr. Cresswell to suspension *ab officio et à beneficio* for eighteen months, to commence from and after the date of publication of the sentence, namely, the 9th March, 1846, and further to continue until he should produce a certificate, approved of by the Court, under the hands of three beneficed clergymen in his neighbourhood, that he had properly conducted himself during the period of suspension, condemning him in the costs of the proceedings. The costs were taxed, on the 10th March, at £581. 19s. 10d.; a Monition for their payment was decreed and issued on the 26th, and attempts were made to serve it upon Mr. Cresswell, but without success. On the 16th April, 1846, Mr. Brookes, the promoter, died. On the 16th May, administration of his effects was granted to Elizabeth Hawkes, but no fresh proceedings were commenced for enforcing the payment of the costs. The period of suspension having expired on the 9th September, 1847, upon the next Court-day, a certificate from three clergymen was exhibited, and

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the Surrogate (Dr. Burnaby) was prayed to relax the suspension; but the application being opposed, on the ground that the costs had not been paid, it stood over until this day.

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Cresswell.*

ARGUMENT.

Addams, Dr., for Mr. Cresswell, now repeated the application. The period of suspension having expired, and a certificate, as directed by the Court, having been brought into the Registry, I pray that the Court will admit the certificate and relax the suspension. When the Motion was made before, it was said that the costs had not been paid; but the sentence did not continue the suspension until the payment of costs. No step has been taken to enforce the Monition or to obtain the costs from Mr. Cresswell since the grant of administration of the Promoter's effects, in May, 1846. Instead of praying a Monition on behalf of the administratrix, the matter was allowed to stand over until the expiration of the eighteen months.

Sir J. Dodson, Q.A., for the administratrix of the Promoter, in opposition to the Motion.—The condemnation in costs was a part of the sentence, and the Court will not relax the suspension until its sentence is fully complied with. Mr. Cresswell defended the suit, and increased the expenses thereby, and he has not paid the costs,—the taxed costs,—in which he was condemned. Various attempts were made to serve the Monition, but he evaded the service. Meanwhile, the Promoter died, and the Bishop of the diocese, from whom the Letters of Request issued, is dead. The certificate is signed by three clergymen, who were examined as witnesses in Mr. Cresswell's favour, and the Court did not rely on their evidence.

PER CURIAM.—The first question is, whether the certificate is sufficient, and the suspension should be relaxed.

Addams.—There are two questions; first, whether the Court will relax the suspension; secondly, whether it will grant a Monition at the prayer of the administratrix for the payment of the costs.

SIR H. JENNER FUST.—The Court was of opinion, in JUDGMENT. this case, upon the whole of the evidence, that the Promoter had established his charges against Mr. Cresswell, and

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—
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accordingly it sentenced him to a suspension *ab officio & beneficio* for eighteen months, such suspension not to be relaxed until he should produce a certificate, which should be approved of by the Court, from three beneficed clergymen, as to his conduct during the period of suspension; and further, it condemned Mr. Cresswell in the costs. However the Court might regret the amount of the costs, and although it was of opinion that, on both sides, the costs had been unnecessarily increased, it could do no less than condemn the party in the taxed costs. The period of suspension having expired, and a certificate, signed by three beneficed clergymen, having been exhibited, the first question which arises is, whether the certificate is sufficient. The three gentlemen who have signed this certificate reside in the neighbourhood of Mr. Cresswell, and they certify that from the 9th March, 1846, to the present time (10th September last), he had resided at his house in the parish of Creech St Michael, and during all that time he had been personally known to them, and had conducted himself with the propriety and decorum which became a clergyman in Holy Orders, and that he is deserving of being restored to the discharge of the functions of his clerical office. Nothing can be more satisfactory than this certificate, stating that these gentlemen have personally known Mr. Cresswell for eighteen months, and that in their opinion he has conducted himself in a manner to justify their belief that he deserves to be restored to the discharge of his clerical offices. That this is a sufficient certificate I have no doubt whatever, and there is no averment to the contrary. It is said that the three clergymen who have signed the certificate were examined as witnesses on the defence of Mr. Cresswell, in the principal cause, and it appeared from their evidence that they at that time knew very little about him. That was during the pendency of that suit; but there has been a period of eighteen months since the sentence, during which they have had personal knowledge of his conduct. If I refuse this certificate, I know not what I am to require. I am clear that this is a certificate upon which the Court is bound to act, as a sufficient one; and then comes the question, has Mr. Cresswell

complied with the sentence of the Court so far as to entitle him to a relaxation of the suspension? Mr. Cresswell has not paid the costs,—that is admitted. A Monition was taken out, calling upon him to pay the costs, and it appears that attempts were made to serve the Monition, which did not succeed. But when? In March and April, 1846, the sentence being pronounced in February, and the suspension taking effect upon the 8th March. On the 10th March the costs were taxed, and the Monition issued; and after the attempts so made to serve it, nothing was done from that time to the present. What was the other party about during this time? If it is competent to the party to apply to the Court now, the application might have been made at an earlier period. Why was the matter suffered to stand over for eighteen months, and, when the period of suspension had expired, and not before, is the Court asked to enforce the Monition? I am of opinion that Mr. Cresswell has complied with that part of the sentence which required him to produce a satisfactory certificate, from three beneficed clergymen, as to the manner in which he conducted himself during the period of suspension, and that he is on that ground entitled to have the suspension relaxed.

This is a question which has been brought before the Court, I believe, for the first time; but I am of opinion that, the Court having directed that Mr. Cresswell should be suspended for eighteen months, and until a certificate should be produced and approved of by the Court, and the period of eighteen months having expired, and a satisfactory certificate having been produced, he is entitled to have the suspension relaxed, and to be restored to the performance of his ministerial duties. But it is a very different thing to say that he is to be relieved from the obligation to pay the costs. The Court relaxes the suspension, but he is still before the Court, and whether the administratrix of Mr. Brookes, the Promoter, may keep him before the Court until the costs be paid, is another question. I am of opinion that the Court is bound to relax the suspension, not only upon general principles, but likewise with reference to the circumstances of this case. I therefore direct the suspension to be relaxed,

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—
Brookes v.
Cresswell.

The party
 entitled to a
 relaxation of
 the suspension.

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and that Mr. Cresswell be restored to the performance and discharge of the functions of his clerical office. [Addams.—The Court will make the order retrospective, to take effect from the 9th September?] No; the suspension has been going on all this time. Let the relaxation of the suspension take effect from this day.

Monition for
 costs;

Sir J. Dodson.—I move for a Monition *vis et motivis*.—[PER CURIAM.—How is it that this application has been delayed until the expiration of the eighteen months, and that no step was taken since April, 1846?] Owing to the death of the Promoter.

SIR H. JENNER FUST.—I am of opinion that, if you are entitled to any Monition at all, it is a Monition to shew cause why the costs should not be paid to the administratrix.

Addams did not oppose the issue of such a Monition, which,

granted.

PER CURIAM, was granted.

Proctors:—*Tobbs*, for the administratrix; *Engleheart*, for the other party.

Prerogative Court of Canterbury.

1st Sess.

NOVEMBER 6.

A will, written by the deceased, exhibiting on each of the two pages his signature and an imperfect attestation-clause, subscribed by three witnesses, as "witnesses to the signature of J. A."—such subscription being made at

IN THE GOODS OF JOHN ASHTON, DEO.—*Motion, en parte.*—The deceased died 21st June, 1847, having with his own hand made his will, which is written on two sides of a sheet of foolscap paper, each of which is signed by the deceased at the foot and by A. H., R. P. A., and T. K. A., as "witnesses to the signature of John Ashton." The first page or side of the paper contains a bequest of his whole property to his wife for her life; and afterwards he gives to three adopted sons £1,000 each; and this page concludes: "At the decease of my wife, M. A. A., I hereby dispose of the remainder of my property as on the other side." On

the reverse side several bequests are mentioned, and the deceased's wife and two other persons are appointed executors. The will is dated 24th August, 1843. It appeared that in the summer (of what year was not known) the deceased produced the will to A. H., spinster, then on a visit at his house, and after signing his name at the foot of the first page, in her presence, requested her to sign her name also, which she did in his presence, no other person being present; but she is unable to say whether any portion of the second page of the will was written at this time, as the sheet was not opened in her presence. On a subsequent occasion (it was believed, the day of the date of the will), A. H. being again on a visit at the deceased's house, the deceased, who was writing at his desk, requested her to sign a paper, upon which she made, in his presence, the signature appearing on the second page of the will, but the deceased did not sign that page in her presence, or state that he had done so, nor did she observe his signature. After she had so signed her name, she, at his request, called in R. P. A. and T. K. A., the deceased's nephews (legatees under the will), who were on a visit to him, and on their entering the room, the deceased requested them to sign the paper, and they accordingly wrote their names at the foot of the first and second pages, in the presence of the deceased and of each other, as well as of A. H.; but the deceased did not sign the paper, or acknowledge his signature in their presence, nor did either of the witnesses see that the deceased's name was signed thereto. The deceased did not on this occasion inform either of the witnesses that the paper he produced was his will, nor was either of them aware of the nature of the document. The property amounted to between £7,000 and £8,000.

Addams, Dr., in moving for probate of the paper, submitted that there had been a good execution within the Statute. The signature was not made in the presence of the subscribing witnesses, but it was virtually acknowledged. [PER CURIAM.—How so?] The attestation-clause, "witnesses to the signature of John Ashton," was written by the testator, and three persons, in 1843, subscribed their

Nov. 6.

Ashton, dec.

his request,—but the witnesses could not depose that the deceased's signature was affixed to the will at the time they subscribed, they being ignorant that the paper was his will,—refused probate on Motion.

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Ashton, dec.

signatures to the will. [PER CURIAM:—They say nothing about whether there was a signature to this paper or not at the time they subscribed.] The witnesses have signed their names to a clause of attestation, “witnesses to the signature of John Ashton,” which must have been there at the time, although they seem to have forgotten it; but the witnesses are called to speak to the fact four years after it occurred. The whole of the will is in the testator’s handwriting; there is a full disposition of the property, and an appointment of executors; and it would be pushing the construction of the Statute to the very extreme if the Court should refuse probate of the paper.

DECREE.

SIR H. JENNER FUST.—If the witnesses could have proved that the paper was signed by the deceased when produced by him, and when he requested them to sign it, that might have amounted to a virtual acknowledgment of his signature; but *non constat* that the paper was signed by the deceased at the time. I reject the Motion in common form; the paper may be propounded, and the parties may then have the opinion of the superior Court, if this Court should be of opinion that there is not sufficient evidence to support the execution. All I do now is to reject the Motion in common form.

Motion re-
jected.

Thomas, Proctor.

Where a testator, residing in Guadaloupe, in his will, appointing testamentary executors (there resident) as to his property in that island, and an executor (his brother) resident in England as to £1,100 stock in the Bank of England (his

IN THE GOODS OF SIMON JOHN NORMAN, DEC.—*Motion, ex-parte*.—The deceased, formerly of London, but late of Guadaloupe, in the West Indies, died 1st May, 1844, having resided in the island, with his father, Simon Norman (now deceased), for many years. Whilst there he made and duly executed his will, bearing date 21st April, 1843, in which he appointed three persons, one of whom was his father, testamentary executors, and his brother, William Norman, residing in London, executor for the sum of £1,100 New Three and a Quarter per Cents, standing in his name in the books of the Bank of England, the only property belonging to him within the province of Canterbury. The original will re-

mains on record in the Registry of the Tribunal of the First Instance at Point-à-Petre, Guadaloupe, and an official copy was brought into the Registry of this Court. The following clause appears therein: "The enclosed letter, to the address of my brother, Mr. William Norman, at Messrs. J. L. Cox & Sons, No 74 & 75 Great Queen Street, London, who I leave my Executor for the sum of £1,100 sterling, which I possess in the New Three pounds ten shillings sterling per Cent. annuities, and my brother, Mr. William Norman, has my Power of Attorney for receiving the dividends on the said sum, which I request to be forwarded with the receipt of purchase of said stock, which will be found amongst my papers." On the 15th September, 1844, Mr. William Norman received a letter from his father, Simon Norman, who had been living with the deceased at Guadaloupe, dated 9th August, 1844, announcing the deceased's death, and detailing in what way the deceased had disposed of the £1,100 stock, namely, that the interest thereon was to be paid to his mother for her life, and at her death, one half of the principal was to be paid to him (the father), and the other half to William Norman, but in case of the father's death in the lifetime of the mother, then the moiety of the principal was to be divided amongst the deceased's illegitimate children, then residing at Guadaloupe. Simon Norman, the father, died in October, 1846; the mother is still living, as also the mother of the aforesaid children. The letter referred to by the deceased in his will has never been received by William Norman, who, in February, 1847, proceeded to Guadaloupe, where he made inquiries of the public authorities, notaries, and elsewhere, as to the existence of such letter, without being able to trace or discover it, and he has no doubt that it is lost.

Robertson, Dr., moved for probate of the will, together with the contents of the letter addressed to William Norman, as executor, limited to the £1,100 stock, with the interest, without the production of the original letter.

SIR H. JENNER FUST.—I am afraid the Court cannot go the length of granting probate of the contents of the

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Norman, dec.

only property in this jurisdiction), referred to a "letter enclosed," addressed to his executor in England, which after his decease was not forthcoming;—the Court refused probate of a letter from one of the deceased's testamentary executors in Guadaloupe (his father, since deceased) to the executor in England, detailing in what way the deceased had disposed of the £1,100 stock, there being no proof that the original letter was ever in existence.

Nov. 6. paper as contained in the letter from the father, as there is
Norman, dec. no proof that the original letter from the deceased was ever
 in existence; and I am of opinion I can only accede to that
 Probate of part of the Motion praying the Court to decree probate of
 will only. the will to the brother, as executor, limited to the £1,100
 stock and interest. It is a very unfortunate case, most un-
 doubtedly.

Glennie, Proctor.

A testatrix, IN THE GOODS OF SARAH WRIGHT, WIDOW, DEC.—
 having execut- *Motion, ex-parte.*—The deceased died 28th August, 1847,
 ed her will, in which she appointed executors, wrote a
 pointed execu- having executed her will, dated 11th January, 1842, with a
 tors, wrote a codicil, dated 28th October, 1846, having in the will ap-
 codicil in which pointed J. M. and C. T. P. executors. The codicil is in the
 was a bequest deceased's handwriting, and at the end is the following
 to her daughter and son clause: "Whatever is due to me at the time of my decease
 (appointed re- from house, bank, &c., added to the sale of my furniture
 siduary lega- and other effects after paying my funeral expenses (which I
 tees, not exe- desire may be economical), or any debts, I leave, according
 cutors, in the to my will, to my dear Mary and Henry, as legatees execu-
 will) as "le- tors." The question was, whether the deceased meant to
 gatees execu- appoint these parties, Mary Wright, her daughter, and
 tors:" — the Henry Wright, her son, executors. The parties themselves
 Court, with had no doubt that she did not mean them to be executors,
 consent of the but that the clause referred to them as the residuary lega-
 parties, decreed tees named in the will; and they had executed a proxy of
 probate to the consent to the grant of probate to the two executors named
 executors nam- in the will.

The personal property was about £2,000.

MOTION. Jenner, Dr., moved for probate of the will and codicil to
 the executors named in the will.

DECREE. SIR H. JENNER FUST.—The question is, whether the
 daughter Mary and the son Henry are executors as well as
 residuary legatees, the parties themselves being of opinion
 that it was not the intention of the deceased to appoint them
 executors; that her intention was only to give them the
 property as legatees. She was not very well skilled in

drawing up codicils, and she gives them this property as "legatees executors." But this is no formal appointment of them as executors. Under the circumstances, the parties being themselves of opinion that they are not executors, and there being a proxy of consent, I am of opinion that the Court is in a condition to accede to the prayer, to grant probate of the will and codicil to the executors named in the will.

Now, Sir,

Will, his dec.

I am of
opinion

Jennings, Proctor.

IN THE GOODS OF SUSAN GLOVER (WIFE OF GEORGE GLOVER), DEC.—*Motion, ex-parte*.—The deceased, who died in August, 1847, upon her marriage with Mr. George Glover, (she being at that time the widow of a person named Reed), by settlement, had reserved to herself the power of disposing of certain property by will. Upon executing this power, in other respects duly, she signed the will with the name of "Reed," her former husband, instead of "Glover." The witnesses saw the name she signed, but did not like to point it out. The question was, whether there was a good execution under the Statute.

A will of a *feme covert*, signed by her with the name of a deceased husband, admitted to probate, as duly executed.

Harding, Dr., moved for probate.

Morton.

SIR H. JENNER FUST.—The question is, whether I may not take it as her mark; that would be sufficient, though she could write. I am prepared to say that I think this a sufficient execution of the will. I believe no case has occurred of this particular kind. There has been a case in which a person, being desired by a testator to sign his will for him, wrote his own name, and that will was admitted to probate. This will is subscribed by the deceased, and the signature is attested by two witnesses who were present at the same time, and I may consider it as signed with her mark. The circumstance that she was disposing of property she had from her former husband may have led to the mistake; still, having been married ten years to her then husband, her mistake is somewhat extraordinary. I am of opinion

Dyce.

* In the Goods of Clark, 2 Curt. 828.

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Glover, dec.
Testator

that the paper, being signed by the deceased in the presence of two witnesses, who attested the same, is entitled to probate.

Jennings, Proctor.

A holograph will, of 1830, written the day before the testator's marriage and in contemplation of that event, bequeathing nearly the whole of his property to his future wife,—pronounced for, notwithstanding subsequent birth of issue, upon evidence of adherence after the birth of the youngest child. — Whether the evidence of the widow, the principal legatee, refusing to pro-pound the will, was admissible in support of it, *quære*.

TAPSTER v. HOLTZAPFFEL AND OTHERS, THE TRUSTEES OF THE GUARDIAN. Cause.—This was a suit for the purpose of obtaining the directions of the Court in respect to the validity of the will of Charles Holtzapffel, late of Charing Cross and Long Acre, manufacturer of engines, lathes, edge-tools, and cutlery, who died on the 11th April, 1847, leaving a widow and five minor children, and possessed of personal property amounting to about £10,000. He left a will, holograph and signed, but unattested, dated the 30th September, 1830, the day previous to his marriage and in contemplation of that event, which bequeathed “the whole of his personal estate” (with the exception of small legacies) to the lady, “with whom,” the writer says, “I have the most causes to hope I shall be in but twelve hours united” (now his widow), signing the paper, “as containing a rough, but sufficiently decisive, instruction respecting his last will.” He retained this paper, notwithstanding his marriage and the subsequent birth of children, in his own immediate custody, until his death, and it was found after that event inclosed in a blank unsealed piece of paper, locked up in his private desk, wherein he kept his papers of moment, which desk he had in constant use, and the key of which he retained in his own possession. The deceased, on several occasions, shewed this paper to his wife, and frequently referred to it in conversation with her and others, from the time of his marriage to within a short period of his death, and subsequently to the birth of his youngest child, in 1845, and to the destruction of the only other papers of a testamentary nature of which any evidence could be obtained, and which appeared to have been drawn up by him with the view to the preparation of a more formal will, to the same effect as the paper in question, the declarations of the deceased to his wife shewing an intention to adhere to

the will; namely, "I do not know what I can do better; the will I have made gives you every thing, the Life Assurance in the Clerical, and your own money is already settled on our children, you having a life-interest in the same." It appeared to be for the interest of all the parties concerned that the validity of the will should be established, particularly with reference to the carrying on, agreeably to the express and anxious desire of the deceased, his business, then yielding an income of about £800 a year.

It having been considered that the facts, stated in affidavits, were sufficient to repel the presumption that the will had been revoked by marriage and birth of issue, the Court was moved to decree probate of the paper. July 9.

PER CURIAM.—The circumstances are certainly very peculiar, and the facts stated in the affidavits shew very strongly an intention to adhere to the paper after the birth of children. I am afraid I must leave the parties to propound the paper. I cannot grant probate against the interest of minor children. I must reject the Motion. There is very strong proof, as far as the affidavits go, of an intention to adhere to the will, and that it would be for the benefit of all parties that the paper should be pronounced for; but I cannot grant probate against the interests of minor children, upon Motion.

The paper was accordingly propounded by Mr. Stephen Tapster, a legatee, against the minor children, the surviving executor according to the tenour having renounced probate and administration, and the widow having refused to propound the paper and renounced the curatrixship or guardianship of the children, both having so renounced and refused, in order that they might be examined as witnesses in support of the will.

Harding, Dr., in support of the will.—This is almost an amicable suit. The paper is propounded by a legatee, in order to avail himself of the evidence of the widow. [*PER CURIAM*.—The effect of admitting the widow as a witness, not appearing as a party in the suit, will be to give her, upon her own evidence, the whole property. The question

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*Tapster vs.
Holtzapffel.*

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ARGUMENT.

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Holtzapffel.

is important as a precedent for other cases.] She is competent under Lord Denman's Act,* which is an enabling Statute, to remove obstructions to the reception of evidence and the discovery of truth. [PER CURIAM.—The will is propounded by Mr. Tapster ostensibly for his legacy, but really and truly for the widow's individual interest.] She is not a party named in the record, nor is she a party on the Minutes. The only question is, whether she is a "person on whose immediate or individual behalf any action may be brought or defended," such person not being made competent by the Act. This is not an action, and she is not a person on whose immediate or individual behalf an action can be brought or defended in this matter, which is a suit by a legatee, defended by the guardian of the minor children, though her interest may be affected by the result of the suit. But if persons having any interest in the result of the suit are excluded from giving evidence, it would be in contravention of the policy of the Statute. *Jenner, Dr., contra, cited Sanders v. Wigton† as having settled this question.*

JUDGMENT.

SIR H. JENNER P.^{res.}—I think there is sufficient evidence to support the will,—shewing adherence to it, and that it was made in contemplation of the marriage,—without the testimony of Mrs. Holtzapffel, and without calling upon the Court, therefore, to decide whether her evidence is or is not receivable. The Court would not decide, until it was absolutely necessary, that a person in Mrs. Holtzapffel's condition is competent to give evidence. I should be sorry to give a decision, in such a favourable case as this, where all is *bond fide*, which must govern other and perhaps very different cases. I am satisfied that this is the will of the deceased, and I pronounce for it.

The costs of all parties to be paid out of the estate.

Proctors:—*Fielder*, for the legatee; *Fenton*, for the guardian of the minors.

* 6 & 7 Vict. c. 85.

† *Ante*, p. 78.

Arches Court of Canterbury.

NOVEMBER 11.

2nd Sess.

1. **THE OFFICE OF THE JUDGE PROMOTED BY FARNALL**
u. CRAIG.—Cause.—This was a proceeding, at the promo-
tion of Mr. George Rooke Farnall, of Burley Park, Hants,
against the Rev. John Kershaw Craig, clerk, minister of the
New Church of Saint John the Baptist, at Burley, in the
said county, for having been guilty of adultery, fornication,
or incontinence. No appearance having been given in the
first instance to the Citation from this Court (whither the
cause was brought by Letters of Request from the Bishop
of Winchester), or to a Decree by Ways and Means, the
Court was moved, on the first session of Hilary Term, Jan. 12.
1846, to pronounce Mr. Craig in contempt, which was
accordingly done; but in the course of that day, during
the sitting of the Court, he appeared personally, and prayed
Articles; upon which occasion the Judge stated that he had
received from him “a very improper letter.”

Articles
against a clerk
in Holy Or-
ders, for adul-
tery, fornication,
or incontinence,—held
to be in part
proved: sen-
tence, suspen-
sion for two
years.

The Articles, which were admitted without opposition,
pleaded as follows:—

1. The general law. 2 and 3. That Mr. Craig, being a clerk in Articles.
Holy Orders of the United Church of England and Ireland, was,
on the 6th May, 1839, licensed as minister of the New Church of
St. John the Baptist, at Burley. 4. That in 1844, and in January,
1845, he, being a married man, residing in a house called Picked
Post, in the New Forest, occupied a bed-room on the upper floor,
and next to the bed-room occupied by his female servants, the bed-
room of Mrs. Craig (his wife) being on the first floor; that during
the period aforesaid, Mr. Craig, when undressed, was in the habit,
after his female servants had retired to bed, of entering into their
bed-room, and therein remaining with them frequently for several
hours, and was guilty of adultery, fornication, or incontinence, as
hereinafter more particularly pleaded. 5. That in May, 1844, while
Jane Shelley, a young girl, then one of his female servants, was
carrying a milk-pail in Varelly Wood (near Picked Post), Mr.
Craig put his arms round her waist and pulled her about in an in-
decent manner; that on or about the 3rd June, 1844, he and Jane

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 —
*Parke v.
 Craig.*

Shelley were in the evening walking together, his left arm being round her waist, in Ridley Wood (also near his residence), and that they there committed adultery together. 6. That in December, 1844, Amelia Archer, then about fifteen, went into the service of Mr. Craig, and remained therein during a fortnight, at which time Joanna Sims, then about fourteen, was also in his service, and the 19th January, 1845; that on the first night of Joanna Sims being in his service, she and her sister, Charlotte Sims, also one of his servants (then about seventeen), and Amelia Archer, occupied one and the same bed in a room adjoining the bed-room of Mr. Craig; who, whilst they were in bed together, on the said night, entered their bed-room in his dressing-gown, and sat down on the side of the bed by Charlotte Sims, who put her arms out of bed, and Mr. Craig remarked to her, "Charlotte, you are cold;" and then put some clothes over her, and said he must go, whereupon she answered, "You must not go yet;" that he shortly afterwards left the bed-room. 7. That, on another night, shortly before the 19th January, 1845, Mr. Craig, having on his dressing-gown and shirt, entered the said bed-room, where Amelia Archer and Charlotte Sims were in bed, and having taken off his dressing-gown, got into the bed, and remained therein with them for several hours; and that he on that occasion committed adultery with Charlotte Sims. 8. That in December, 1844, and January, 1845, Mr. Craig frequently, in the kitchen of his house, sat before the fire between Amelia Archer and Charlotte Sims, and on some of such occasions Charlotte Sims laid her head upon his lap, and also sat upon his knee, and that on one evening, while so sitting, she said to Amelia Archer, "Look here, I will shew you something you have never seen;" that she, without any resistance on his part, unbuttoned Mr. Craig's waistcoat, and then said, "I shall not shew you to-night, for he is ashamed;" that also, during the said period, Charlotte Sims on several occasions remained alone with Mr. Craig at night in his bed-room, when he behaved to her in an indecent manner. 9. That Amelia Archer having been taken from his service by her mother, in consequence, as he well knew, of a complaint made by the former to Mary Archer, her mother, of his conduct pleaded in the 7th article, Mr. Craig, on or about the day she left his service (19th January, 1845), called on Mary Archer, and asked her to let her daughter come back; that Mary Archer refused, saying, "She could not let her go back on account of his going into the girls' bed-room;" that Mr. Craig thereupon replied "that he had not done so, and had only rapped at the door, as time for them to get up." 10. That on a

Sunday, shortly before Christmas, 1844, two or three young girls, parishioners of Mr. Craig (and among them Ann Smith), went to drink tea in the kitchen at his house, and after tea Mrs. Craig played to them in the drawing-room upon the organ, and with him sang or chanted part of the service of the Church; that the girls having had their supper in the kitchen, Mr. Craig, being in the kitchen, pulled back the chair whereon Ann Smith was sitting, and putting his hands round her, kissed, or attempted to kiss her, and tickled the knees of Jane Shelley with one of his hands, saying he did so to see if she was jealous. 11. That, subsequently to the premises in the preceding article, Mr. Craig went to Lydia Smith, mother of Ann Smith (to whom, as he well knew, Ann Smith had complained of his conduct as before alleged); and, in reference to an interview which she had, an hour or two before, had with Mr. Farnall, inquired of her what Mr. Farnall had come about; that she said he had come concerning her daughter, whom he had heard he (Mr. Craig) had attempted to kiss when she went to tea; to which statement Mr. Craig gave no denial, and made no reply, but, the following day, wrote to Lydia Smith, requesting her daughter to come to his (Mr. Craig's) house. 12. Exhibits the letter. 13. That, for such excesses, Mr. Craig ought to be canonically corrected and punished. 14. That on the 4th February, 1845, application was made to the Archbishop of Canterbury by Mr. Farnall, charging Mr. Craig with adultery, &c., whereupon, on the 6th March, 1845, the Archbishop, by virtue of the Act 3 & 4 Vict. c. 86 (the Bishop of Winchester being the patron of the New Church), issued a notice to Mr. Craig, and on the 25th of March issued a Commission, directed to the Ven. C. J. Hoare, Archdeacon of Winchester, Rev. W. J. Yonge, Rural Dean, Rev. R. Fortescue, Rev. J. P. Hammond, and Rev. C. Hatch, to inquire into the grounds of the charge, who reported that there was *prima facie* ground for instituting further proceedings, and that the Bishop of Winchester thereupon sent the case by Letters of Request to this Court.

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Craig.

On behalf of Mr. Craig a Defensive Allegation was brought in, which, after reformation, pleaded as follows:—Defensive Allegation.

1. That Mr. Craig has not violated the laws Ecclesiastical, but has, since his residence at Burley, faithfully and diligently discharged his duty as minister, and acquired the good-will, and conducted himself to the entire satisfaction, of the great majority of the inhabitants of the district, among whom he was held in high

Nov. 11.

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esteem and regard, as well for the manner in which he performed his public ministrations; as for his attention to the schools, and also to the poor and sick of the district, and such excess and regard continued undiminished up to the present moment. 2. That Mr. Craig and his wife, who had been married for fourteen years, and had four children, have always lived and cohabited in terms of great and uninterrupted affection; that their occupying separate bed-rooms was solely owing to the delicate health of Mrs. Craig. 3. That Mr. Farnall, the promoter, has entertained and manifested in various ways a feeling of great personal animosity and ill-will towards Mr. Craig, and that each and all of the charges articulated against him have been wickedly and maliciously brought by Mr. Farnall, and are utterly false and unfounded; that Mr. Craig has never been guilty of any act of adultery, fornication, or incontinence, and has never taken any indecent, improper, or unbecoming liberty or familiarity with any female whatever. 4. Counterpleads the charge of indecent familiarities by Mr. Craig with Jane Shelley, alleged in the 5th of the Articles, in Väreley Wood, and pleads that William White, the only witness produced in support of this charge (and who is a servant of Mr. Farnall), in his evidence before the Commission of Inquiry at Ibsley, deposed on cross-examination that such transaction occurred whilst Mr. Craig rented a farm (meaning a farm at Väreley), which was given up by him in 1842, and that no farm had been rented or occupied by Mr. Craig at any time since 1842. 5. Counterpleads that part of the 5th Article which charges the commission of adultery between Mr. Craig and Jane Shelley in Ridley Wood, and pleads that it was distinctly sworn by White (the only witness examined in support of this charge), in his evidence before the Commissioners, that he witnessed the commission of the offence in Ridley Wood on the evening of the 3rd June, 1844, at seven o'clock; whereas the wood consists of full-grown beech trees, without underwood of any sort; has a public road leading from Ridley Bottom directly through it; is crossed by paths in various directions, and is the play-place of children in the neighbourhood, and much frequented by such and others, especially on summer evenings, and is exposed throughout to public observation. 6. Exhibits the deposition of William White before the Commissioners. 7. That a meeting of a Female Club is held annually at Brockenhurst, Hants, on the Tuesday following Trinity Sunday, which is of interest to the country-people, many of whom attend to witness the walking of the members; that such meeting in 1844 was on the 4th June, and that, in the evening of the 3rd, Jane Shelley was at home; it

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the house of her father and mother, the whole of the evening, from between five and six until she went to bed, and that during no part of such evening was she at all in the company of Mr. Craig, in Ridley Wood or elsewhere. 8. That Amelia Jane Archer (a witness produced in support of the Article) was in the service of Mr. and Mrs. Craig twice only, for a fortnight only on each occasion, and on each to supply the place of Jemima Sims, their regular servant, during her temporary absence on account of ill-health, and never was in their service for a fortnight with Jemima Sims; that the nights of the 19th December, 1844, and the 19th January, 1845, were the only nights Archer and Jemima Sims spent together in Mr. Craig's house, and when Archer slept in the same bed with Sims, and in which also slept on those nights Charlotte Sims (then and still in Mr. Craig's service), an elder sister of Jemima Sims, and that on neither of such nights (nor on any other night) did Mr. Craig go into any bed-room in which they, or either of them (or any other of his female servants), were or was then in bed, and there sit down, and conduct himself as alleged in the 6th Article, or go at all into any such bed-room under any such circumstances. 9. Counterpleads and denies the whole of what is alleged in the 7th of the Articles, and pleads that Mr. Craig was never, on any occasion, guilty of adultery, fornication, or incontinence with Charlotte Sims. 10. Counterpleads and denies what is alleged in the 8th of the Articles, and pleads that on no occasion did Mr. Craig sit between Amelia Archer and Charlotte Sims; that on no occasion did Charlotte Sims lay her head upon his lap or sit upon his knee, or act as alleged; and that on no occasion did he behave to Charlotte Sims in an indecent manner, or remain alone with her at night in his bed-room. 11. That Mr. Farnall has been repeatedly assured by Amelia Jane Archer that what is alleged in the 7th and 8th of the Articles was false and unfounded, and that she knew nothing to the prejudice of Mr. Craig. 12. Counterpleads the 9th of the Articles, and pleads that Archer, having been hired for a particular purpose and period (as before pleaded), remained the time for which she had been hired, viz. until Jane Sims returned; that, instead of taking her away, her mother, on the morning of Saturday, 18th January, brought her daughter such things as she required for attending church the next day, being the day Sims returned to her place, and the 20th being the day on which Archer left; that no complaint was at any time made by Amelia Archer to her mother; so far from it, she was unwilling to leave her situation, and when she did leave, expressed her desire to return to it, should Jemima

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Sims find her strength unequal to it, and her mother allowed her not only to go to the church, where Mr. Craig officiated, but to act as a teacher, under him in the Sunday schools. 13. That Ann Jane Archer has, since her examination as a witness on the Articles, been again received into the service of Mr. Farnall's family, or taken into his service, being (as well known to him) in an advanced state of pregnancy at the time. 14. That the 10th of the Articles contains in part a perversion of the truth, and in the other part an averment of what is absolutely false; that the Sunday therein referred to was the 19th October, 1844, being an odd occasion on which Ann Smith ever bore witness to Mr. Craig's house; that what really then occurred was as follows:—Ann Smith, living with her father and brother, recently become an attendant at the church, was asked by Mrs. Craig to come to their house and drink tea with the servants, which she accordingly did, in company with Maria Sims, who had been invited in like manner. Jane Shelley and Jane Sims then living there as servants; that after supper (between which and tea the four young females had gone up stairs into the parlour, and assisted or been present at the singing of some Hymns, whilst Mrs. Craig played upon the organ), and just as the four young females were preparing to leave, Mr. Craig had some conversation with Ann Smith relative to purchasing a copy of prayer-books, one for herself and one for her brother (which he requested him to do), and then as to Ann Smith or Maria Sims coming to help to wait on a party of visitors expected at his (Mr. Craig's) house on the following day; but that neither on this, or on any other occasion did he kiss or attempt to kiss Ann Smith, or tickle the knees of Jane Shelley, expressing himself as articulate, and that Mr. Farnall himself, previous to the institution of this suit, was repeatedly assured by Ann Smith that on no occasion had she been treated with, or ever witnessed, any impropriety whatever on the part of Mr. Craig. 15. That the 11th of the Articles is in part a perversion of the truth, and in part false altogether; that no such complaint as is therein alleged had been made by Ann Smith to her mother at such time; that the day on which both Mr. Farnall and Mr. Craig called on Lydia Smith was not the 23rd, but the 20th, of January, 1844, on which 20th Mr. Craig was about to accompany his wife to Alderholt Park in a fly hired from the Crown Inn at Ringwood for that purpose, and that the letter exhibited in the Article had reference to other matters in relation to the proceedings of Mr. Farnall, and not to any complaint of Ann Smith, or to any conduct of Mr. Craig towards her.

Allegation had been, in the first instance, directed to me; it was then subducted, and a fresh Allegation brought in, which was objected to, and directed to be reformed, and was then admitted.

Further Allegation, by Mr. Farnall, pleaded that Mr. Craig had been and was in the habit of performing his ministrations in an irregular manner; that he had allowed work to be in the reading-desk with him, and to read lessons, and had on many Sundays omitted to read extracts of the service; that, partly owing to such irregularity, the church, during the year 1845, was seldomed on the mornings of Sunday by more than six or seven persons, and in the evenings by more than twenty, exclusive of children, many of the inhabitants attended, since the commencement of 1845, a Dissenting chapel, built in 1841; that, about the year 1840, of the subscribers to the parochial school discontinued their subscriptions, in consequence of the inattention of the minister, and that the school had decreased from about eighty boys and girls to about eight girls and two boys, while in a school in connection with the Dissenting chapel opened, and was attended by about forty-six boys; and that Mr. Farnall had not manifested a feeling of permity and ill-will towards Mr. Craig; and that he prohibited the Articles at the instance and request of the Bishop of Winchester.

The Allegation was admitted without opposition. Further Allegation, on behalf of Mr. Craig, denied that work had been admitted to the minister's desk, or had he read Lessons therefrom, since the end of 1842, or beginning of 1843, and pleaded that the reading of the Lessons by work from his own desk in the morning (but never in evening) service, had been continued in consideration of Mr. Craig having been long subject to a spitting of blood, the fatigue occasioned by the walk of twelve miles Sunday, that it was untrue that Mr. Craig had refused to read certain parts of the service on many Sundays, that it was only done on one occasion, in 1842, in consequence of Mr. Craig's alarm and anxiety about a son,

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June 12.

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Further Defensive Allegation.

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Nov. 19. This Allegation was opposed, but was admitted (after reformation), the Court observing that the proceeding plea (of the Promoter) ought to have been opposed, since it led to a response which raised a new issue in the cause, and the Court, by being compelled to admit this plea, was made a party to an irregularity on both sides.

After publication of the evidence, pleas exceptive to witnesses were admitted on both sides. In the meanwhile, a Motion was made to the Court to direct an application to the Vicar-General for the production of certain documents in his Registry, which the Court rejected.

1847.
June 10, 21, & 29. *Haggard and Jenner, Drs.*, argued the case for the Promoter; *Addams and R. Phillimore, Drs.*, for Mr. Craig.

Nov. 11. *JUDGMENT.*—*SIR H. JENNER, FUST.*—(After stating the nature of the case.)—The Letters of Request were presented (to, and accepted by, this Court on the 20th November, 1845; a Decree issued, and was returned on the 12th December, 1845, with a certificate and affidavit of the officers, that actual service of the Decree could not be made, and a Decree by Ways and Means issued at the petition of the Promoter, which was returned on the 30th December; but no

appeared was given on behalf of the party cited. On the first Session of Hilary Term, 1846, an affidavit was brought in, made by Mr. Lawrence Hill, with a certain exhibit annexed, stating that the Decree by Ways and Means, which had been affixed to the door of the Church of St. John the Baptist, Burley, had been removed, or caused to be removed, by Mr. Craig, and a most offensive paper (whether libellous or not it is not for me to say) substituted. I forbore to read the paper, which is of a most offensive character. The party, not appearing, was pronounced in contempt, and a Decree to see proceedings issued against him. However, during the sitting of the Court upon that occasion, Mr. Craig appeared. The Articles were brought in, and admitted without opposition. A defensive Allegation was brought in by Mr. Craig, which was admitted as reformed; a further Allegation was brought in by the Promoter, and on the part of Mr. Craig an Allegation responsive thereto, upon which no witnesses were examined, but the Answers of the other party were taken. An exceptive Allegation on behalf of each party was admitted, upon which witnesses were examined.

Before the proceedings commenced in this Court, a preliminary inquiry took place at Burley, before Commissioners appointed by the Lord Archbishop of Canterbury, the Bishop of Winchester, in whose diocese the district parish of Burley is situated, being the patron of the living, and according to the provisions of the Act, the preliminary inquiry is, in such a case, to be carried on in the name and under the authority of the Archbishop of the province. Four of the five Commissioners, including the Rev. Mr. Yonge, the Rural Dean (the Archdeacon of Winchester, the other Commissioner, not being present), met in April, 1845, to conduct the inquiry. It appears that many witnesses were examined on both sides, and the inquiry occupied nine days; four days in the examination of the witnesses produced by Mr. Farnall, and five in the examination of the witnesses on behalf of Mr. Craig; and the result was, the unanimous Report of the Commissioners that there was a sufficient *prima facie* case to call for further inquiry. This Report was

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made in May, 1845; but the proceedings in this Court were not commenced until November in that year, and it was argued that the delay, from May to November, had been inconvenient and prejudicial to Mr. Craig. Undoubtedly the Court must feel regret at any delay in the proceedings in a cause of this description; but there are circumstances which will very naturally account for some part of the delay in this case. After the Report, made in May, 1845, a large mass of evidence was to be considered, and evidence of a very contradictory character; and the preliminary proceedings having been carried on for the first time in the name of the Archbishop of the province, though the offences had been committed in the diocese of Winchester, the Bishop of Winchester not being competent to take upon himself the office of initiating the proceedings, some time was necessarily required to form an opinion as to the probable result of the evidence, and the sittings of this Court in Trinity Term concluded about the middle of July, 1845, when Counsel take some recreation, after their minds have been fatigued and exhausted during the sittings of these Courts in the preceding part of the year. And again, the question would arise, whether the Archbishop of Canterbury should prosecute the cause, or the Bishop of Winchester? The preliminary proceedings had been carried on in the name of the Archbishop of Canterbury, and Counsel would have to advise whether the ulterior proceedings should be carried on in the name of the Archbishop, or whether the Bishop of the diocese should send the case, by Letters of Request, here. That the right course was adopted, I have no doubt, and the cause, being sent to this Court by Letters of Request from the Bishop of Winchester, the proceedings commenced in the usual course.

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That they were carried on in the usual course, it would not be exactly correct to say; for although it has been said that it is a proof of the confidence of Mr. Craig in the justice of his own cause that he did not throw any obstructions in the way of the proceedings, it does not look very like confidence, and offering no obstacles to the proceedings of the Court, to give no appearance, to exhibit a contempt of the Court, and to

remove the Decree from the church door; and it is proved that he evaded the service of the Decree; that, being in his house at the time, he locked the door, and prevented the service of the Decree, and removed the Decree by Ways and Means; and substituted a most offensive document in its place. All these circumstances are calculated to create an impression not very favourable to the person to whom these observations apply. Upon this part of the case, the Court is of opinion that there is nothing in the way of grievance to be complained of by Mr. Craig; and that for the delay from November, 1845, to January, 1846, he is himself the party to blame, if blame is to rest anywhere.

There has been a great deal of extraneous and irrelevant matter introduced into the evidence, which has swelled it to a great bulk; and a great deal of this evidence and of the argument of Counsel has turned upon questions as to the proceedings of the Commissioners. It has been argued that there was a degree of partiality in these proceedings, and very strong observations upon this part of the case were made by Mr. Craig, in a letter addressed to one of the witnesses, Miss Margaret Angus, directed against the Promoter and the Rural Dean, and even the Bishop of Winchester does not escape the censure of the writer. I say all this is perfectly extraneous and irrelevant. This Court is not sitting as a Court of Appeal to revise the proceedings of the Commissioners at Ipsley; this Court has not materials to decide whether the Commissioners properly conducted the inquiry or not; whether evidence was received which ought not to have been admitted, or evidence was rejected which ought to have been received. This Court has no materials before it to determine these questions; it has not all the evidence taken before the Commissioners of Inquiry; to enable it to contrast the evidence of the witnesses examined before the Commissioners and in this Court (who are said to have contradicted themselves); this Court has only a part of the evidence before it; a number of witnesses were examined before the Commissioners who have not been examined here; and as to the Commissioners, it is quite impossible for this Court to enter into questions respecting the

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conduct of persons who are not before it; the Court has neither materials nor authority to enter into such matters. But with regard to the conduct of the Commissioners of Inquiry, the functions of those gentlemen differ from those exercised by this Court. The province of the Commissioners is not to inquire whether the party be guilty or not of the offences imputed to him; but whether there is a case of scandal and evil report, and whether there is reasonable ground for such evil report and scandal; and to report whether there be a sufficient *prima facie* case to justify further proceedings: and, therefore, very possibly the Commissioners may be justified in receiving evidence, in order to ascertain facts—I give no opinion upon this point, not admissible in a Court of Justice, which has to decide upon the guilt or innocence of the party. It is very true, the Commissioners are empowered to make an investigation and to report the result, whether there be ground for further proceedings, so that the Report may have the effect of an acquittal; if they report that there is no ground for further proceedings; but it cannot have the effect of a conviction, for that must be by a proceeding before an ulterior tribunal; namely, before the Bishop of the diocese, or this Court. Therefore, I abstain from entering into a consideration of the course which the Commissioners pursued in conducting their inquiry, for which this Court has not means or materials.

Now the conduct, to a certain extent, of the Bishop of Winchester has been brought into question; and it has been said that the Bishop was hasty in instituting the proceedings, and that there was a letter of Mr. Farnall (which was not acted upon) which was the commencement of the proceedings, and which has not been produced. The Bishop of Winchester requires no justification at the hands of the Court; but I must say, I do not see what other possible course the Bishop could have taken. He received intimation that there were certain scandalous reports against Mr. Craig's conduct in the parish, and he writes to inform Mr. Craig of it, and that a preliminary inquiry would be made. I do not see what other course the Bishop could have taken than to institute such an inquiry as to these reports. That these reports

were in existence before the 17th January, 1845, the date of the letter of the Bishop,* there can be no doubt whatever; but, whether or not, the Bishop directed an inquiry to be made, as he was justified in doing; the inquiry was made and the result was that, in the unanimous opinion of the Commissioners, there was sufficient *prima facie* ground for the inquiry and for further proceedings. I have heard the letter read from the Bishop of Winchester to Mr. Farnall, which was somewhat irregularly introduced into the cause, for the letter is no regular evidence in the cause. If any thing was to be obtained from the Bishop of Winchester, he ought to have been examined. But the letter of the Bishop of Winchester is any thing but of a vindictive nature, or showing that there was any prejudice in his mind, or that he entertained any hostility against Mr. Craig. I think the conduct of the Bishop of Winchester in this case has been perfectly free from all objection, and that no other course could have been taken by him than that which he did take in this proceeding.

Upon the Report of the Commissioners, I do not see how the proceeding could be stopped. Whether the evidence is or is not sufficient to oblige the Court to come to the conclusion that Mr. Craig has been guilty of the offences laid to his charge, is a question for further consideration; but upon

* The following is a copy of the Bishop's letter:—

Farnham Castle, Jan. 17th, 1845.
 "Rev. Sir, I have received a letter from Mr. Farnall, bringing against you a charge, of having had improper intercourse with one or more young females.

"Such a charge ought to be made the subject of immediate investigation, for the sake of the clergyman himself who is exposed to the scandal as well as of the Church.

"The proper course will be to proceed as directed by the Church Discipline Act, 3 & 4 Viet. c. 86. But before I take any steps in the matter, I think it right to lose no time in acquainting you with the fact, that a complaint of the nature I have stated has been laid before me, in case you should desire to make any communication to me on the subject.

"I am, Rev. Sir, Yours very faithful servant,
 "Rev. J. K. Craig." "C. WATSON."

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the unanimous Report of the Commissioners, it was utterly impossible that the Bishop could stay the progress of the cause, or that the Archbishop of Canterbury could have directed the proceeding to be stopped. Nor has Mr. Craig's conduct tended to put a stop to the proceedings, for a number of printed statements and letters, and an address to the Archbishop of Canterbury, were put forth, after the Report of the Commissioners, calling upon him to prevent any further proceedings against Mr. Craig, and casting reflections upon the Commissioners and many of the witnesses they examined. But I say all these matters are irrelevant to the cause and to the question to be decided by the Court, whether Mr. Craig is or is not guilty of the offences laid to his charge.

The Court, therefore, disclaims all authority to inquire into any thing relating to the conduct of the Commissioners, or of the Bishop, or of any others but the Promoter, and Mr. Craig, and the witnesses examined in this Court. I have stated the steps taken to bring the cause before this Court, and those taken by Mr. Craig to prevent the proceedings from going on in the regular course. It would have been a course more becoming in Mr. Craig, as a gentleman and a clergyman, to have appeared to the Decree, instead of shutting himself up in his house, and ordering his servants to bar the doors, and preventing the person entrusted with the service of the Decree from obtaining access to him, and taking means to obstruct all service, pulling down the Decree by Ways and Means, and substituting another paper; it would, I say, have been much more becoming a gentleman and a clergyman to have appeared and defended himself in a regular manner.

(After stating the substance of the several pleas,)

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It is not denied that, if the facts charged against Mr. Craig by the Promoter are proved, they amount to a gross violation of decency in any man, and especially in a clergyman, and that they render him amenable to ecclesiastical law. The defence of Mr. Craig is, that these charges are not only altogether false and unfounded, but that they have been maliciously brought forward by Mr. Farnall; and a

great part of the Argument on behalf of Mr. Craig was directed to that part of the case, attributing malicious motives to Mr. Farnall, and imputing to him not only the bringing forward of false and unfounded charges, but the attempting to support them by perjury; persons having been, it is said, suborned to give false evidence, and induced by threats and promises to depose to that which is altogether without any foundation whatever. The Court is not much in the habit of entering into a consideration of the motives of persons who stand forward as Promoters in cases of this description; but, under the peculiar circumstances of this case, the Court is bound, in justice to all the parties, to consider how far the allegation against the Promoter is supported, that he has been actuated by malicious motives in bringing forward these charges.

It certainly appears that Mr. Craig and Mr. Farnall are not on intimate or amicable terms; that Mr. Farnall does bear feelings of bitter animosity against Mr. Craig—there can be no doubt about that; and there is as little doubt, looking at the letters and memorials, that there is a pretty fair share of animosity on the part of Mr. Craig towards Mr. Farnall. It appears that Mr. Farnall has expressed himself in terms of reproach against Mr. Craig, and may have been led by the reports respecting him to wish to get rid of Mr. Craig out of the district. All this goes to the extent only of shewing a great probability that Mr. Farnall would readily avail himself of an opportunity of accomplishing his wish, to get rid of Mr. Craig; but that will not induce the Court to come to the conclusion that Mr. Farnall would have recourse to undue means of accomplishing his object, or to such a course as is suggested in one of the articles of Mr. Craig's Allegation, and in the interrogatories put to the witnesses examined on behalf of Mr. Farnall. It may possibly be true, as suggested by the learned Counsel for Mr. Craig, that, under the influence of the feelings which Mr. Farnall entertains towards Mr. Craig, he may have lent a too credulous ear to the stories related to him as to the conduct of Mr. Craig, and have proceeded without sufficiently inquiring into the foundation upon which such stories rested. But

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that is a different thing from suborning persons to come forward and support the charges by perjury. The Promoter is the person to bring forward the charges, and to prove them by witnesses; but he is no witness himself. He is merely the Promoter of the office of the Judge, and it is on the evidence of the witnesses he produces, and of those on the other side, that the Court is to decide the cause; the Court is to judge of the effect of the evidence. I have looked through the evidence to see if there be proof that Mr. Farnall has invited witnesses, and I can find none to that effect. Twenty-seven witnesses have been produced on the third article of the Allegation, imputing to Mr. Farnall the bringing forward these charges from wicked and malicious motives; and yet not one of these witnesses will take upon himself to say that the charges are wickedly and maliciously brought forward. They do say, each of them, that the charges are false, but they will not say that they have been wickedly and maliciously brought forward by Mr. Farnall. That Mr. Farnall had reports made to him as to the conduct of Mr. Craig there can be no doubt. A person of the name of Jane Sims, a servant in the family of Mr. Craig, appears to have been the originator of the reports; she left her situation in Mr. Craig's family on the 6th December, 1844, and though it appears that she afterwards retracted what she had said to Mr. Farnall, that she did make a report to Mr. Farnall is clear, otherwise she had nothing to retract. But she does not withhold it from other persons; she does not confine her confidence to Mr. Farnall; she communicates the charge to Charity Head, to Mrs. Smith, to Ann Smith, and to her sister Maria. The communication she made to Mr. Farnall and to these witnesses was, that Mr. Craig had seduced her, and Charlotte Sims, and Jane Shelley. The nature of the reports, therefore, justified any person in making inquiry of those individuals as to their truth, and these are the reports upon which Mr. Farnall acts in the letter No. 1, to Mr. Phelps (dated 20th January, 1845), namely, that Mr. Craig had seduced some of his servants; and that he had had a statement from the father of two of the individuals; and on the 11th interrogatory, Mrs. Smith says she understood and believes that John

Sims, the father of Jane Sims, is the person who originally made the complaint to Mr. Farnall of what his daughters had told him. "But, as I said, it does not rest upon the report of Jane Sims, as there is the evidence of Charity Head, who was in communication with her and her sister Maria. But to other persons she made a communication, who are equally credible with Mr. Farnall; for she communicates it to Charles Young, whom she married in September, 1845, and he believes what she said she told Mr. Farnall, and he acts upon it; for he says he in consequence staid away from church from the middle of January till the 30th March following, so that he was not satisfied of the falsehood of the charge made by Jane Sims against Mr. Craig. There is no reason, therefore, to believe that this charge was wickedly and maliciously brought forward, without sufficient ground for Mr. Farnall to rest it upon. But the Court guards itself against its being supposed that it takes the evidence of Jane Sims as proof of the charge against Mr. Craig; the Court has no intention of doing so; the purpose for which the Court uses it now is to shew that the report, whether founded or unfounded, did not originate with Mr. Farnall, but with Jane Sims.

It does not exactly appear when the information was first communicated to Mr. Farnall. Jane Sims left the service of Mr. Craig on the 6th December, 1844, and it is not suggested that she retracted any part of the charge she had made until January, 1845; so that there was ample time for the disseminating and giving currency to these reports throughout the parish; and her sister Maria says that, when Jane was on Mr. Farnall's side, she referred to these goings on, and often said to her, "Don't you recollect the evening when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent you going home that night, and he came to our bed?" This comes out from Maria Sims upon interrogatory; that, during the time her sister was on Mr. Farnall's side, she repeatedly said this to her.

Now it was on the authority of Jane Sims, confirmed as it was by other reports, that Mr. Farnall communicated with the Bishop of Winchester. The letter (the first letter)

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written to the Bishop by Mr. Farnall, is not produced, and it is said that this is a great hardship to Mr. Craig, as the Bishop could not have written the letter No. 7 (dated 17th January, 1845) unless there had been some other charges. But I am not aware that there is any thing which calls upon the party to produce this letter, written by him to the Bishop of Winchester in respect to the conduct of Mr. Craig. The letter of the Bishop of Winchester, as I have said, has been introduced somewhat irregularly. The letter of the 17th January is merely in consequence of one received by the Bishop from Mr. Farnall, and the Bishop writes to Mr. Craig, informing him that he had received information of the kind, and that he should direct an inquiry and proceedings to be instituted. The Court has no power to compel the production of Mr. Farnall's letter. The party is entitled to have copies of all the proceedings before the Commissioners, and to be furnished with the names of the persons on whose information the proceedings are to be instituted, and the nature of the charges against him; but beyond these he has no power to call for any further information. I cannot inquire into what passed between the Bishop of Winchester's Secretary and other parties, and between Mr. Johns and the Proctor, for these matters have nothing to do with the cause. They shew not much confidence in his innocence on the part of Mr. Craig, but rather a desire to avoid the proceeding in consequence of the expense. But these matters are all irrelevant to the subject of inquiry, and do not sustain the accusation against Mr. Farnall of having maliciously brought forward these charges; and if the letter were produced, it does not appear probable that it could furnish any thing beneficial or advantageous to Mr. Craig.

Having noticed these matters connected with the original preliminary proceedings, I now come to the question upon which the whole case turns, namely, whether Mr. Craig is to be considered guilty or not guilty of the offences imputed to him; whether the evidence of the witnesses in support of the charges is sufficient to call upon the Court to pronounce that the Promoter has succeeded in establishing them.

The evidence as to Mr. Craig's general conduct and cha-

rafter is uniform; all the witnesses depose in strong terms to his conduct during the time he has been in the parish; that he contributed very liberally to the endowment of schools, and was constant in his attendance at the schools; there is evidence to shew that he was kind and attentive to the poor and sick of the parish, and that he not only constantly attended the schools, but that he contributed to them as far as his means allowed, and probably more than could be expected from him, when it is considered that his stipend was only £100 a year. It is proved by all the witnesses in the cause that he and Mrs. Craig lived on terms of affection; that she walked about with him, and attended the church to receive the Sacrament from him. There is evidence to shew that, during the time Mr. Craig resided at Edmonton, before he came to Burley, and at Oulton, he conducted himself in the most proper and correct manner. I refer to the evidence of Miss Angus and Mr. Palmer. But there was annexed to the Allegation of Mr. Craig a memorial coming from the inhabitants of Oulton, and another from the inhabitants of Edmonton, and if the Court was at liberty to attend to these memorials, I have no doubt that they would confirm the evidence of Miss Angus and Mr. Palmer. But the Court rejected them; and why? Because Mr. Craig might have produced witnesses from amongst these inhabitants to speak to his conduct. The very same circumstance occurred in the case of *Kilson v. Loftus*.* There never was a memorial more strongly signed than the paper annexed to the Allegation of Mr. Loftus; yet in that case the Court found itself under the necessity of rejecting it: and on that occasion one of the learned Counsel engaged in this case argued against receiving the document by the Court. If Mr. Craig wished to derive advantage from evidence to character, he should have examined witnesses, who would be open to cross-examination; and the Court is satisfied that it did right in rejecting the memorials. But I do not think I have done any injustice to Mr. Craig thereby, for I am entitled to presume his good cha-

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racter until the contrary is shown. Besides that, he was appointed by the Lord Bishop of Winchester, in whose diocese the district is situated, and the Bishop never would have permitted a person of improper character to come into such a district as Burley was, so destitute of spiritual instruction until the building of this church in 1889, to which object £100 was contributed by Mr. Farnall, who was a very zealous promoter of the building of the church. The place was destitute of any spiritual superintendence or instruction until the chapel was built. Now, as the patron was the Bishop of Winchester, and he knew the destitution of the parish, he would not have appointed a person who he was not satisfied was qualified by his moral and religious principles to undertake the charge of it. So that Mr. Craig has suffered no prejudice by the rejection of the memorial from the inhabitants of Edmonton and Oulton. Mr. Craig, therefore, came, in May, 1889, to the parish with a character unimpeached, and, as far as appears, unimpeachable. But we all know that, notwithstanding the strongest testimony to character, the result has shown that persons may be very materially deceived respecting the conduct and character of a party. In Mr. Loftus's case, no testimony could be stronger than that given to his character; whereas he had forfeited it by his subsequent conduct. So that the Court, notwithstanding every presumption in favour of Mr. Craig, must come to its conclusion upon the result of the evidence in the cause.

Conflict of
the evidence.

Now, unfortunately, the Court must pronounce in this case that, on one side or the other, there has been the most shameful and barefaced perjury. It is a case in which the Court cannot reconcile the evidence of the two sets of witnesses: there are direct and positive charges on one side, met by direct and positive contradictions on the other, by persons with the same means of knowledge, and who cannot be mistaken. For when Ann Smith says that, on the occasion when she was at Mr. Craig's house, he pulled her chair back and kissed her, and Shelley and Maria Sims say he did not, one or the other of these witnesses must swear falsely. Again, Amelia Archer says, Mr. Craig came into

1 their rooms and sat down by the bed, and said to Charlotte
 2 Sims, who put her arms out of bed, "Charlotte, you're
 3 cold;" and Charlotte Sims denies it altogether. Archer also
 4 speaks to Mr. Craig's conduct in the kitchen, and to Char-
 5 lotte Sims laying her head in his lap, which others distinctly
 6 deny. And as to the occurrences in Ridley Wood, the fact
 7 is spoken to in positive terms by White, and as positively
 8 contradicted by Jane Shelley, not only as to that occasion,
 9 but as to any other, and she swears that no act of adultery
 10 ever took place between Mr. Craig and her. Under these
 11 circumstances, it is utterly impossible that the evidence
 12 can be reconciled, and therefore the Court is driven to the
 13 necessity of deciding to which class of witnesses it is to give
 14 credit, and which it must pronounce guilty of direct per-
 15 jury: the Court cannot escape from it. How, then, is the
 16 Court to deal with the evidence? Very slight circumstances
 17 may give a preponderance to one side or the other, and the
 18 Court must look to see the manner in which the witnesses
 19 have deposed, the stories they have told, the probabilities
 20 of their stories, and the motives which may influence the
 21 witnesses on one side or the other to depose falsely.

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There are three particular facts in this case, namely, the
 adultery alleged to have been committed in Ridley Wood;
 the transaction between Mr. Craig and Ann Smith, on the
 19th October, 1844; and what occurred, as alleged, be-
 tween him and Amelia Jane Archer, in December, 1844,
 and January, 1845.

 The main
 facts in the
 case.

The transaction in Ridley Wood is deposed to by William
 White, and there is no doubt that White, before the Com-
 missioners, referred to the transaction as taking place on the
 Monday after Trinity Sunday. White is a resident in the
 parish, and on the 5th Article he deposes that he remembers
 seeing Mr. Craig and Jane Shelley once in Vaneley Wood
 and once in Ridley Wood. He says he was peat-cutting
 when he saw them in Vaneley Wood, coming along the path
 which the hunters use; that they were about fifty yards off
 when he first saw them, and then they saw him, and
 "pulled up with a kind of stop." But this, he says, must
 have been about four years ago. "When I saw Mr. Craig

 The 5th
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and Jane Shelley together in Ridley Wood," he goes on, "it was in 1844; I am certain of that; it was about the time of the May-poling at Picked Post; it was three days after it, I recollect quite; it must be just the beginning of June I saw them this time. It might be a mile and a half from Mr. Craig's house. I was in the wood after a nitch of sticks, about halfways through the wood. I could find none on the ground, which we are allowed to take, and so I got up the tree to break off the dead, and it was whilst I was up in the tree I saw them. I heard voices first, and that made me look about, for fear I should be found out in the tree, and I saw Mr. Craig and Jane Shelley together in the road,—one of the cart-roads, a forest road. When I first saw them, they were about twenty yards off; they turned off from the road, and passed closer to the tree, to be at one time about ten yards only from it: it was in the evening, about seven o'clock." Then he deposes to having witnessed an act of criminal connection between Mr. Craig and this woman, not more than ten yards from where he was. "I saw them in the very act," he says; "there could be no doubt about it in the least." When he says that this took place three days after the May-poling, that would be the 1st June; but there can be no doubt that it was the understanding of the parties, that White intended to represent that it took place, as he stated before the Commissioners, on the 3rd June, the Monday after the May-poling.

A great deal of evidence has been given as to the state of the wood; and the general representation is, that it is not a place very likely to be chosen for committing such an act. Here again the Court has been called upon to reconcile the evidence of the witnesses as to passengers frequently passing through the wood, or to the probability of the parties being detected: all which is not necessary to be particularly considered and decided by the Court. The great question is as to the existence of the fact itself deposed to by White. How is his evidence met by the other side? In the first place, Jane Shelley, one of the parties, has been examined, and she positively denies that she ever was, either on the 3rd June or any other day, with Mr. Craig in Ridley Wood,

and she positively denies that there ever was any criminal connection between her and Mr. Craig. With regard to this witness, Jane Shelley, the Court would not be inclined very much to pay attention to her evidence, especially considering the mode in which she has given her deposition upon the interrogatories administered to her by Mr. Farnall. It is suggested that she had given some information to Mr. Farnall, and in answer to the interrogatory—to which a paper (the Exhibit I.) is annexed, which is placed before her, and which paper purports to be signed by the witness in two places—she says: “Mrs. Craig taught me to write. I am not a good pen-woman. I think that I’ve improved since May, 1845, a little. I’ve inspected the Exhibit annexed to the proceedings under the Commission of Inquiry, marked I,* and now shewn to me by the Examiner, and I have referred to the two signatures, ‘Jane Shelley,’ appearing at the end thereof. I believe that the second of the said signatures is mine; I think it was the one I made at Ibsley; but I don’t know whether or not the first of the said signatures is mine or not;

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* The following is a copy of this part of the Exhibit I:—

“Jane Shelley says—I have been in Mr. Craig’s service 5 years last September. When first I went to him I was about 13 years of age. Mr. Craig was then living at Stocks Farm; he afterwards removed to Picquet. I do not remember the exact time. Charlotte Sims came shortly afterwards as my fellow servant. I was then, I should think, rather more than 14. Charlotte Sims and I slept together usually. About 6 months after Charlotte Sims came was the first time Mr. Craig took any liberties with any me [*sic*]. He then came into our bed room (I was sleeping with Charlotte Sims) about 10 o’clock, and got into bed. We neither of us called out. I got under the clothes. He staid a short time, and then went away. I kept the door shut for some time afterwards, and he did not come. He returned afterwards, occasionally, and came to our room of a morning before we were up. One morning he threw the bed clothes back. He first had an improper intercourse with my fellow servant,—I believe it was Charlotte Sims,—and afterwards with me, on the same morning. He had the same intercourse with me several times afterwards. I never mentioned this to my father or mother.”

“17 January 1845.”

“Jane Shelley.”

“Jane Shelley.”

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it's like mine, and it may be mine, but I don't think it is." So that she will not swear that it is her signature or that it is not; she will neither admit nor deny that it is her handwriting. And she says, "I did tell the Commissioners at Ibsley, that I thought the signature was not mine, but that I would not swear that it was not." Therefore, there is no proof that she did sign the paper, or knew the contents of it. But there is a circumstance to which the Court must refer, which was pleaded in the 7th article of Mr. Craig's Allegation. That article was afterwards struck out, under a misapprehension that the Court so directed it. I am quite certain that this was an entire misapprehension. The Court directed the reformation of the article, but there was no ground for rejecting it. The 6th, 7th, 8th, and 9th articles pleaded:—

6. That the statement annexed to the Report of the proceedings before the Commissioners, and now remaining in the Registry of the Vicar-General of the Archbishop of Canterbury, marked I, to the first side* of which the signature of one Jane Sims was procured by Mr. Farnall, was and is wholly untrue, and the same was so declared to be on oath by the said Jane Sims when produced as a witness before the Commissioners by Mr. Farnall.

7. That the signature of Jane Shelley, originally affixed to another part of the same statement or Exhibit (the second subscription having been made by her before the Commissioners at Ibsley), was fraudulently procured thereto by Mr. Farnall: That the said Jane Shelley having been sent for to and attended at the house of Mr. Farnall, accompanied by her father, had on the 17th

* The first side of the Exhibit I is to the following effect:—

"Jane Sims, 16 her last birth-day, says she was in Mr. Craig's off and on for 2 years; during the last time she was in his service for 9 months, and left at Xmas 1844, during which time she slept sometimes with Jane Shelley and sometimes with Charlotte Sims. On the first night of my return, Mr. Craig came into our room. I was sleeping with Charlotte Sims. He got [*sic*] our bed, and he had an improper intercourse with both of us. Mr. Craig repeated this frequently, so often that I have no recollection of dates. It occurred sometimes when I was sleeping with C. Sims, and sometimes with Jane Shelley, and he then had the same intercourse with Jane Shelley. I never mentioned this to my father or mother."

"16 January 1845."

"Jane Sims."

January, 1845, an interview with him, at which her father was not permitted to be present: That at such interview Jane Shelley frankly and truly answered the questions which were addressed to her by Mr. Farnall, and denied firmly and unhesitatingly that Mr. Craig had ever conducted himself criminally or indecently with or towards her, or with or towards any other person, to her knowledge or belief: That Mr. Farnall was very angry thereat, called Jane Shelley a liar, and endeavoured (though unsuccessfully) to induce her to speak against Mr. Craig, of and towards whom he expressed himself in terms of violent hostility and abuse, accusing him of having taken five of the prettiest girls out of the school into his family for the purpose of seduction, and expressed his great desire to prove that one girl, under thirteen years of age, had been seduced by him, in order that he might get him transported: That towards the end of the interview, Mr. Farnall desired Jane Shelley to sign her name to a paper then lying on the table, and on which he had been writing, to wit, the paper I aforesaid: That Jane Shelley signed her name to such paper without reading or having the same read to her, which she so did by the direction of Mr. Farnall, who told her that he could write in her statement better another time: That there was at this time a blank space before the signature of Jane Shelley: That at the conclusion of such interview, Mr. Farnall told George Shelley, the father of Jane Shelley (who was then admitted into the room), that he could get nothing from his daughter; to which George Shelley replied, that "if she knew nothing, she could say nothing."

8. That, notwithstanding the premises, the paper marked I was produced in its present state (save and except the second signature of Jane Shelley) before the Commissioners at Ibsley on behalf of Mr. Farnall: That Jane Shelley did upon oath declare before the said Commissioners that the whole of the letter and material parts of the statements therein contained, to which Jane Shelley's name then purported to be subscribed, the truth of which she also then distinctly denied on oath, were not made by her, and were not contained in the paper on which, and at the time when, she signed her name thereto, on the occasion mentioned in the next preceding article; and the party proponent expressly alleges that what she so declared was and is true.

9. Exhibited an official copy of the statement marked I.

So that these articles left no doubt that Jane Shelley did sign her name to that identical paper I. It is impossible that the Court could have rejected these articles of the

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Allegation, though it required them to be reformed in respect to the declarations before the Commissioners; she was to speak to the fact before this Court. But it is expressly alleged in one of these articles that she did sign this document marked I. The evidence of Jane Shelley, therefore, in answer to the interrogatory, is in direct opposition to the plea of Mr. Craig, and this shews how little dependence can be placed upon the evidence of a witness who deposes as Jane Shelley has done. Mr. Craig averred that there was a fraudulent attempt made by Mr. Farnall to obtain the evidence of Jane Shelley; that she signed the paper without knowing what the contents were, and that there was a space left for additions afterwards. I have no doubt whatever that this article of the Allegation was not rejected by the Court. Then this witness, Jane Shelley, has, in this respect, not given a fair and candid statement, and the learned Counsel for Mr. Craig admitted that it would have been more fair and candid for her to have acknowledged that the signature was hers. It is suggested that she might have forgotten the fact, or been mistaken; but I do not think that either could have been the case.

This witness also gives a very extraordinary account of the manner in which she lived in Mr. Craig's family. She says she had been in his service for five or six years; not a continued service, but, as the witness says, "off and on." She says first she quitted Mr. Craig's family five or six months before the 3rd June, 1844. She says on the 1st article that she left about two years before her examination (which was in June, 1846), and has never been there since; yet we find that she was in Mr. Craig's service again in 1844. I say, where a witness deposes as she has done, it is impossible for the Court to place any great reliance upon her evidence.

But Jane Shelley is not the only witness on this part of the case; for Mary Ann Young, George Shelley, and others, depose to circumstances which, if true, shew that it is impossible that, on the 3rd of June, adultery could have taken place in Ridley Wood between Mr. Craig and Jane Shelley.

In the 7th article of Mr. Craig's Allegation an account is

given of a club which is held at Brockenhurst on the Tuesday following Trinity Sunday, which was on the 4th June, 1844, and it pleads that Jane Shelley was at home, at her father's house, the whole of the evening of the preceding day, from five or six o'clock. Upon this article several witnesses have been examined, whose evidence goes to shew that, on the 3rd June, Jane Shelley was at home, and to state circumstances which, if true, prove that she could not have gone to Ridley Wood between seven and eight o'clock on the evening of the 3rd June. These witnesses are principally Jane Shelley herself, her mother Mary Shelley, George Shelley her father, Mary Young, and Charles Young. The story they have told is, that, on the afternoon of that day, Mrs. Young and her daughter, Mary Ann Young, went down to a place in the forest to drive the cows home, and were there until five or six o'clock; that Jane Shelley went with them (with a child in her arms) to drive the cows, and on their way home they met Charles Young, the son, and he was in communication with his mother and Jane Shelley until nine o'clock in the evening. If this be true,—if, from five o'clock until nine, Mrs. Young was with Jane Shelley for part of the time, and Charles Young for the rest of the time,—it is clear that Jane Shelley could not have been in Ridley Wood with Mr. Craig between seven and eight o'clock on that day. All the witnesses agree in this statement, and in a most remarkable manner, not only in substance but almost in words; their evidence is almost *verbatim* the same. This is a very remarkable circumstance, and the Court may have some doubt whether the parties are relating the facts as they actually occurred to them, or whether it be not a story which has been got up,—I do not say falsely invented, but got up by being talked over again and again. It was fortunately discovered that Brockenhurst fair was on the 4th June, and the subject has, perhaps, been talked over and over again by the parties, and the Court may have some doubt whether it could rely on the statements of persons so deposing as these witnesses do depose. But I feel a great deal of difficulty in holding that the evidence of White, un-

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confirmed by any witness, or by any circumstances whatsoever, is sufficient. He is a single unconfirmed witness, and although there is no reason to suppose that he has deposed wilfully falsely, or that his character (though a servant of Mr. Farnall) is exceptionable,—and there is no imputation proved against his general character,—yet, under the circumstances, the Court could not consider itself justified in holding, on the single evidence of White, with other evidence contradicting it, that the charge of adultery in Ridley Wood, on the 3rd June, is established.

There is another circumstance: there was a paper annexed to the interrogatories addressed to some of the witnesses, to test the truth of their story, purporting to be signed by a gentleman named Westcott, a medical practitioner at Ringwood, dated 17th February, 1846, the effect of which is to certify his “decided opinion” that Jane Shelley had never been connected with any person. Now this certificate never could be received as evidence at all, and the Court was bound to reject it. The Court could not receive it as evidence of any examination; but it was applied as a test, “Do you believe, in the face of that certificate, that Jane Shelley could have signed the paper?” It would have been conclusive had Mr. Westcott been examined upon oath. Why was he not examined? It is a remarkable deficiency in the case that Mr. Westcott should not have been examined as a witness. But notwithstanding this, the Court is still of opinion that it would not be justified in holding, on the single uncorroborated evidence of White, that the adultery with Jane Shelley, in Ridley Wood, at seven o'clock in the evening of the 3rd June, is proved. But when he came here, White seems to have been in doubt as to the day on which it occurred, and seems to fix another day, three days after the May-poling. The May-poling being on the 29th May, this would make it the 1st June, and I think Mr. Craig was at home during the afternoon of the 1st June, some coals having been brought to him from Poole on that day. I have not much doubt that on the 1st of June Mr. Craig was at home. I am, therefore, of opinion, on this part of the case, that there is not

sufficient evidence of an act of adultery having been committed between Mr. Craig and Jane Shelley, either on the 1st or the 3rd June. At the same time, it does not necessarily follow that White has deposed falsely and corruptly; there is room for supposition that he has made a mistake as to the day: whether it be so or not, the Court is not at liberty to inquire. On this part of the case, the Promoter has failed in proof of the Article relating to it. Nov. 11.
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The next subject for consideration is the charge with regard to Ann Smith. The transaction occurred on the 19th October, 1844. It was originally pleaded to have taken place shortly before (the Sunday before) Christmas; but it now appears to be fixed to have occurred on the 19th October, 1844. It seems that Ann Smith and her mother had been attending at Burley Church, and Mr. Craig invited her to go up to his house and take tea with his servants. The establishment of Mr. Craig at this time consisted of two female servants, and that was the general establishment of the family, and at that time Jane Shelley and Jane Sims were the two servants. Ann Smith says she did go, accompanied by Maria Sims, and they went down to the kitchen, where they drank tea, and staid to supper. On the 10th Article she says, "After supper, whilst I was sitting, Mr. Craig pulled back my chair, that is, he put his hands over my shoulders, and pulled me and the chair back together, and he kissed me. Mr. Craig came into the kitchen to us about ten minutes or so after we had been at supper; he first stood talking to us for a little while, and then, before he kissed me, he tickled Jane Shelley on the knee, to see, as he said, if she was jealous; and almost immediately afterwards he came round and kissed me, as I have said." The 10th and
11th Articles.

This witness has undergone a very strict cross-examination; she has been solemnly adjured and threatened with a prosecution for perjury, and told that Mr. Craig would be examined upon the prosecution for perjury; still there is no hesitation; the witness persists in her story, and it is not improper for the Court to state the manner in which the witness does depose to these facts upon interrogatory.

On the 13th special interrogatory, she denies various

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suggestions put to her, which are in substance the same as are deposed to by witnesses examined on behalf of Mr. Craig. She says, "I have attended carefully to the statement read to me by the Examiner; it is quite false, and I can't think how Mr. Craig can put such falsehoods to me." Here is a direct negative to all the suggestions contained in the interrogatory. She then details the circumstances, as stated in her evidence in chief, denying all the suggestions put to her. On the 14th interrogatory she says: "I am desired by the Examiner to remember that, besides what is written in the Bible, about Hars having their portion in the lake that burneth with fire and brimstone, Mr. Craig himself can be examined as a witness on a prosecution for perjury, and that every person by whom I can be contradicted can also be examined, and that Mr. Farnall cannot protect me from the consequences of a conviction; still I swear solemnly and deliberately that, on the Sunday evening I have spoken of, Mr. Craig, in his own kitchen, put his hands upon my shoulders, pulled me back, held me for about a minute, and kissed me; that he also tickled the knees of Jane Shelley, saying that he did so to see if she was jealous; and that his whole conduct and language was improper to us." And again, on the 78th interrogatory, nothing can be more positive than the statement she has solemnly averred and deliberately deposed and adhered to.

There are other circumstances which the Court is bound to take into its consideration with respect to this witness. This occurrence took place in October, 1844, and the witness does not communicate any particulars of what took place until just before Christmas, 1844, when she says she mentioned it to Mrs. White, who had asked her why she did not go to church, and she said it would remind her of Mr. Craig's conduct to her, which she then told her. Mrs. White told this to Mr. Farnall, who called at her mother's, and told her, and afterwards sent for the witness.

Lydia Smith, the mother of Ann Smith, says that, soon after Christmas, 1844, Mr. Craig called upon her, and asked her the object with which Mr. Farwall had come to her

house, (who had just left it), and she told him of the tales respecting his conduct, and of Mr. Farnall having said something to her about his (Mr. Craig's) kissing her daughter; that Mr. Farnall had charged him with coming down to the kitchen and kissing her daughter. She says, Mr. Craig made no reply to this, not denying or acknowledging it, and he went away. Two or three days afterwards, she says, she received a note from Mr. Craig, to ask her daughter to go up to his house, which she (the mother) refused to allow. This letter has been exhibited, and is dated January 24th, beginning, "Dear Mrs. Smith."

It appears that Mr. Farnall, having heard of the conduct of Mr. Craig, in kissing this young girl in his kitchen, went to Mrs. Smith, and asked her about it. Mrs. Smith did not know of the circumstance, but said she would ask her daughter, who was not then at home. She did so, and her daughter, then, for the first time (in the month of January), communicated the fact to her mother, who mentioned it to Mr. Craig when he came immediately afterwards to inquire about the object of Mr. Farnall's visit. Upon the additional interrogatories addressed to Mrs. Smith, she confirms her daughter as far as she could do so.

Two witnesses have been examined to contradict Mrs. Smith and her daughter, Jane Shelley and Maria Sims. Jane Shelley's evidence is to this effect: that, on Sunday, the 19th October, 1844, Ann Smith and Maria Sims came to take tea with her and Jane Sims; that they got home about six o'clock, and after going up into the drawing-room to hear the organ, and singing some of the church hymns, they went down into the kitchen again, and they staid there talking until about nine o'clock, when they had supper; that, when they had done supper, the bell rang and she went up to answer it, and found Mrs. Craig wanted some gruel to be made, and she (witness) told Mr. Craig that Ann Smith wanted to see him, for she had told the witness she wanted to see him before she went; that Mr. Craig came down with her, and when they came down into the hall, they heard them shuffling about in the kitchen, and as they were going into the door, Jane Sims said, "What do think Ann Smith

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said, Sir? and Ann Smith said, Is you tell Jane, I'll never speak to you any more? then Mrs. Craig then said, If she has said any thing, don't tell it of her, Jane, and asked her what she wanted him for, and she told him she wanted a Prayer Book for her and her brother; and he said he could not get them so well, as he did not belong to the Ringwood Society; and she said she wanted some as she and all their people, her father and mother were going to leave the chapel and go to church; and then she said he would try and get them for her; and then he said there was a party coming from Salisbury the next day, and he would have some one to come and help; and Ann Smith said she would stay all night, if Maria would go home with her; her father and mother knew where she was; and Mrs. Craig said he thought Maria had better come; as she was more used to the house; and he did not like one of them to go home at night, as it was dark; and so Maria was to come next morning; that Mr. Craig then went upstairs again; and Ann Smith and Maria Sims left the house; and she denies that Mr. Craig did, or that of any other occasion, to her knowledge, kiss or attempt to kiss Ann Smith, or tickle or make any tickle her (the witness) kneed; or that she saw any, the least, impropriety, on the part of Mr. Craig towards Ann Smith or anybody else; and if there had been any improper conduct on his part, she must have seen it; And so not. (The Court must, therefore, determine the question of credit between these witnesses, coupled with the other evidence; and I do believe the account of Ann Smith to be the true account, or I have no hesitation in saying that, if I am to choose between the two witnesses, the inclination of my mind is in favour of the story told by Ann Smith, and against that told by Jane Shelley; considering the probability of the account and the degree of credit the witnesses are respectively entitled to at the hands of the Court; but—) But there is another witness, Maria Sims, who deposes to the same effect, and says, "I will swear that Mr. Craig did not pull Ann Smith, or either of us, back in the chair, or put his arms round her, or kiss her, or attempt to kiss her, or any of the others, nothing of the kind took place

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All that passed was this: when Jane Shelley was gone upstairs (to tell Mr. Craig that Ann Smith wanted some Prayer Books), Ann Smith said that she should like for Mr. Craig to kiss her; and then, as Mr. Craig was returning down stairs into the hall, my sister Jane said, "I'll tell Ann, what you said," not meaning for Mr. Craig to hear her; and then Ann Smith got up and said, "Jane, if you'll tell, I'll never speak to you again;" and then Mr. Craig said, "Whatever she said, don't tell of her," and that was all that took place about the kissing. Mr. Craig didn't either shake hands or kiss Jane Shelley, nor ever went near her. He didn't take any liberty with any one of us all that evening, nor ever at any other time that I know of. It is the evidence of this witness to be taken in preference to that of Ann Smith? What does she say in answer to the 5th interrogatory? After solemnly denying that, on the occasion when Edin Sims took her up to Mr. Farnall's house, and when she said she knew no harm of Mr. Craig, her sister Jane said to her, "Don't you recollect that evening, when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent you going home that night, and he came to my bed?" and that she (the witness) replied, "Well, if he did, you knocked for him;" and this witness was reminded of her oath, and solemnly enjoined by all her hopes of salvation to speak the truth, when she said, "My sister Jane, when she was on Mr. Farnall's side, often said to me, and I remember also in the presence of Eli and his wife, 'Don't you recollect that evening, when you were walking up and down the kitchen, Mr. Craig persuaded me to prevent you going home that night, and he came to our bed?' and I don't think she said so the time I was going up to Mr. Farnall's;" and she said she didn't tell; and can't recollect whether she did not that time, or whether she didn't; but won't swear she didn't. Does whether (where a witness gives such an answer to an interrogatory, it shows that she is entitled to a proportionate degree of credit to Ann Smith? Here is an admission drawn from her, after a denial of perjury, by the strength of the interrogatory. It is no evidence against Mr. Craig as to the fact, but it is evidence against the credit of

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and 8th Arti-
cles.

the witness. Then between this witness and Ann Smith there can be no question as to which is entitled to credit, I am, therefore, of opinion, on the whole of this part of the case, that it is established, as pleaded, that Mr. Craig did go down to his kitchen, and there tickle Jane Shelley, and did pull back the chair of Anna Smith, and put his arms round her neck or on her shoulder, and kiss her; and I am, therefore, of opinion, that the 10th and 11th Articles are established by the evidence produced to support them.

The last charge is that spoken to by Amelia Jane Archer. This charge is contained in the 6th Article. Archer went into the service of Mr. Craig in December, on the day when Jemima Sims and Shelley left his service. She says, that she and Charlotte Sims slept in the same bed, in the bedroom adjoining Mr. Craig's bedroom, and while they were in bed together, Mr. Craig came into the room, not long after they had gone to bed, and sat down on the side of the bed on which Charlotte Sims lay, who put her arms out of bed, and he said, "Charlotte, you are cold," and he then put some clothes upon her, and soon after he said he must go, and left the room; that Charlotte Sims said, when he said he must go, "You shan't go yet;" that there was laughing and talking before between them, and he was not there more than a quarter of an hour; that it was night and dark, and there was no candle. On the 7th Article she says that, on another occasion, in January, 1845, after Charlotte Sims and she had gone to bed, Mr. Craig came into their bedroom, and got into their bed, and remained in bed with them until the morning; that during that time he asked the witness to kiss him; that he and Charlotte Sims talked together, but no act of adultery took place between them. On the 8th Article she says that, during the time she was in Mr. Craig's service, he frequently came into the kitchen, and sat before the fire, and Charlotte Sims often put her head upon his lap, and once sat on his knee, on which occasion she unbuttoned his waistcoat and said to the witness, "Oh, look here, and I'll shew you something you've never seen;" that Mr. Craig said nothing; he only smiled. On the 9th, she says she complained to her mother

of Mr. Craig's going on with his servants, and she took her away, about the 19th January, 1843.

This is her account of what took place with herself, Charlotte Sims, and Jemima Sims. This witness has undergone a very long cross-examination. A vast number of interrogatories are put to her, in order to shew that she is not a person to be believed on her oath as to the transactions she has deposed to, and she does depose differently here from what she did at Ipsley, to a certain extent. It appears from the evidence of her mother that she told her nothing more than that Mr. Craig came into their bedroom; but she seems to have made more communication to Mr. Farnall. I cannot help thinking that she is in some degree confirmed by Charlotte Sims, who states, upon the 12th article of Mr. Craig's Allegation, that Mrs. Archer did not say she wished her daughter to leave for good.

Both the other two women, Charlotte Sims and Jemima Sims, deny that Mr. Craig ever came into the room. Here again the Court is to say whether it will give credit to the Sims or to Archer, supported by her account to her mother, and by her mother's conduct. It is clear that her mother wished her to leave and she desired to stay, but the great point in this part of the case is, the paper signed by this witness, to this effect: "I have never seen or known any thing immoral or any impropriety in Mr. Craig while I have lived in his service." This paper was drawn up on the 19th January for the witness to sign, when Mr. Craig knew she had been to Mr. Farnall, and made some communication. The witness says she supposed that the paper referred to immoral conduct towards her. The paper is in Mr. Craig's handwriting. It is clear that there had been no act of adultery to her knowledge. This paper is to have the effect of shewing that the witness is not a person upon whom the Court can altogether rely; but it does not and cannot go to the extent of shewing that she is not to be believed when she deposes to a fact, she supposing, as she says, when she signed the paper, that it referred to immorality as respected herself. This is an important date, for it is the day after the retraction of the other witness, Jane Sims. It

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is a paper which does throw considerable difficulty and doubt upon the question as to the extent to which this witness is to be believed, and upon this part of the case, as well as that deposed to by White, I am not quite satisfied that I should be justified in pronouncing the charge to be established on the evidence of Archer, although she is in many respects confirmed by her mother, and there is the fact of her having applied to be taken into the service of Mr. Craig again. There are also some circumstances connected with the Excessive Allegation; and upon the whole, on her evidence, I do not think I am at liberty to say that the proof is so satisfactory to my mind as to call upon me to pronounce that the charge is clearly established. But I do not think it is disproved; I do not think it is an invention; and I cannot say that there is no suspicion attaching to Mr. Craig on this part of the case. That is a very different thing; the Court, before it can say that, must be satisfied that, on this part of the case, as well as on the other parts, the Articles are disproved. But I have held that, with respect to the charge spoken to by Ann Smith, it is proved indisputably, and that lays a not improbable ground for believing that, with other persons, Mr. Craig could have carried his conduct to a greater extent. On the other two charges, however, I have come to the conclusion that the party has failed in his proof; but I also hold that Mr. Craig has been proved to have conducted himself, under the circumstances pleaded in the 10th Article, in a most improper manner on the 19th October, 1844.

The great difficulty is to know in what way this offence is to be visited on Mr. Craig. If he had been able to satisfy the Court of his innocence with respect to the charge spoken to by Ann Smith, the Court would have been bound to pronounce that the other party had failed in his proof altogether; but on one Article he has been proved to have conducted himself in a highly improper manner, and the Court must pronounce some censure on Mr. Craig. If the charges had been proved altogether, there must have been a sentence of deprivation, for there could be no doubt what would be the effect of such conduct in the parish, and he would not have

been a fit person to remain in charge of such a parish as this; but it being only proved that he has conducted himself as he has done towards Ann Smith, the question is, what sentence the Court shall pronounce. And then with respect to the costs, that is a very material question, for the costs will be very heavy. A great deal of extraneous matter has been introduced into the proceedings, and how is the Court to divide the costs? I hold that the Promoter has proved sufficient to justify the institution of proceedings in this Court; I think that Mr. Farnall has proved that he has not come forward with wicked and malicious motives, and that Mr. Craig has given occasion to these proceedings. I therefore suspend Mr. Craig from the performance of duty and from the emoluments of his benefice *ad officia et a beneficia* for two years from the date of this sentence, and until he shall produce the usual certificate; and I must condemn Mr. Craig in some part of the expense of the proceedings here; but as it is impossible to say what part has been incurred by each charge, I shall condemn Mr. Craig in £250 *nomine expensarum*. I pronounce that the Promoter has failed in proof of the 4th, 5th, 6th, 7th, 8th, and 9th Articles, and that the remainder are sufficiently proved.

Proctors:—*Jenner*, for the promoter; *Bowler*, for the party cited.

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Suspension for two years.

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2nd Sess.

FRERE v. FRERE.—*Motion.*—The deceased, the Right Honourable John Hookham Frere, died 7th January, 1846, at Malta, where he had resided since April, 1821, with occasional temporary absences, until his death. In September, 1826, being in England, he executed a will in the English form, attested by three witnesses. There was sufficient

A British-born subject, domiciled in Malta, having made his will in England, according to the English law.

Nov. 16. evidence to shew that he had abandoned all intention of returning to England, and had established his domicile at Malta. *Frere v. Frere.* The question was, what was the law to be applied to his testamentary acts? From an affidavit of Dr. Antonio Micallef, an advocate of Malta, it appeared that, as to what concerns wills, codicils, and donations *causâ mortis*, the Courts of Justice in Malta, "generally speaking," regulate themselves by the local laws and customs, and, in default of laws and customs of the country, by the decisions and opinions of the tribunals and writers on jurisprudence; that, in cases of succession *ab intestato* to property at Malta, the Courts regulate themselves, "generally speaking," by the Novels 118 of Justinian, as interpreted by Courts and writers, with the exception of a few local legislative provisions; that wills, not being privileged, made in Malta, must be executed in the presence of seven witnesses, and codicils in the presence of five witnesses; that according to the *Code Rebus*, a municipal law of Malta, if the disposition made be not valid as a will, it shall have effect as a codicil or donation *causâ mortis*, if executed in the presence of five witnesses. The learned advocate further expressed his "opinion," that if the will is not made in Malta, although that of a Malta subject by birth or domicile, whether relating to movable or immovables, situated in the island, the Courts of Justice in Malta cannot consider the act as invalid, if it be made according to the law of the place in which it was executed; but he was not aware of any express decision on this point by any Court in the island, or of any express enactment by the laws of Malta.

The executors named in the will had renounced probate of it, and a Motion was now made that the Court would pronounce against the validity of the will, all the members of the family (except those who were minors) having consented to an intestacy.

MOTION.

Phillimore, Dr., in support of the Motion.—It being clear that the deceased died domiciled at Malta, by recent decisions, the law of the domicile must govern his testamentary acts. *Somerville v. Somerville*.^{*} *Stanley v. Bernes*.†

^{*} 5 Ves. 750.

† 3 Hagg. E. R. 373.

Groker v. Marquess of Hertford.* By the law of Malta, Nov. 16.
 which is based upon the Roman law, no testament is valid *Frere v. Frere*.
 which is attested by fewer than five witnesses.

SIR H. JENNER FUST.—I do not know what the law of DECEASED.
 Malta really is, according to the opinion of this learned
 advocate, and his affidavit is the only evidence I have upon
 the subject. This will, which the deceased executed in
 1826, in England, he acknowledged in 1844 to be a good
 will; he sent it to this country in that year to have some
 alterations made in it, and it must operate as to the real pro-
 perty in England. [*Phillimore*.—There is a letter from the
 deceased which shews that he did not consider it as a good
 will.] I cannot set this will aside merely because the
 family wish it; I must be satisfied that it is not a good will
 according to the law of Malta. If you satisfy me that a
 will made in England by a person domiciled in Malta,
 according to English law, is invalid by the law of Malta, I
 will pronounce against it. But I understand from the
 opinion of Dr. Micallef, that the Courts at Malta would not
 consider such a will invalid. I am clearly of opinion that I
 cannot grant this Motion. It is clear that the deceased had
 not forgotten his will in 1844, for he directed alterations to
 be made in it, and requested his brother in England to
 draw up another will, and a draft was sent to him, but he
 did not execute it, and is supposed to have destroyed it.
 According to this learned advocate, the testamentary law of
 Malta is, “generally speaking,” the Roman law, modified
 by the municipal law and by the local customs, but no tes-
 tamentary disposition is valid which is executed in the pre-
 sence of fewer than five witnesses. This applies to wills
 “made in Malta.” But the question here is, whether a will
 made in this country, according to the law of this country,
 by a person domiciled in Malta, is a good and valid will in
 Malta; and he tells you that he will not say that such a will
 would be held to be of no effect, though he is not aware of
 any decisions which would support its validity. His

* 4 Moo. P. C. C. 339. 3 Notes of Ca. 150.

Nov. 16. opinion, however, is, that a will made by a domiciled subject of Malta, but not in that island, according to the law of the country where it was executed, cannot be pronounced by the Courts of Justice at Malta invalid and of no effect. Then can I say that this will is invalid according to the law of Malta? Certainly not. I am of opinion, therefore, that I must reject this Motion, for it is impossible for me to say, upon such evidence as is before me, that this will is invalid. I must reject the Motion. I am sorry for it.

Frere v. Frere.

Motion rejected.

W. Townsend, Proctor.

Entries made in a book, kept by a mariner, when at sea, written in pencil and unattested, admitted to probate, on evidence of handwriting and of declarations, as containing his will.

IN THE GOODS OF THOMAS THOMPSON, DEC.—*Motion, ex-parte.*—The deceased, late master and owner of the barque *Sarah*, of London, died at Valparaiso, 2nd February, 1846, leaving a widow and several brothers and sisters. He was in the habit of keeping an "Abstract Book," wherein he entered any particular occurrence that took place during his voyages; and in the book he had with him on his last voyage are two entries, in pencil (other entries being also made in pencil), to the following effect. The first purports to have been made July 24, 1845, when the vessel was lying off Otaheite: "Should any thing happen me [*sic*], Mr. Geo. Herring will pay himself—all other ac^{ts} to be paid by my dear wife, to whom I bequeath all I possess in this world Thos. Thompson." The second entry is as follows: "Dec 5 [1845], Friday, 1. 30. Weighed, stowed anchor, and proceeded to sea. Myself and Metcalfe very ill. I leave all to my own wife." Mrs. Thompson, who was at sea with the deceased, arrived in England in July, 1846, with the apprentice, bringing the Abstract Book, which she delivered unread to Mr. Herring, the ship's broker, who wished to see it in consequence of the Log Book having been left at Valparaiso, where the deceased died, and it remained in his possession until October, 1847, when he handed it to Mr. Thompson's solicitor, who had been endeavouring to substantiate certain declarations made by the deceased in favour of his wife as a nuncupative will. In the affidavit; Mr. Herring and H. D. Murphy, the apprentice, proved that the

entries in the Abstract Book were of the deceased's handwriting, and the latter deponent stated that he sailed in the *Sarah*, with the deceased, who was accompanied by his wife, from London, on a voyage to the South Sea Islands; that the vessel arrived at Otaheite on the 26th July, 1845, and remained there until about the 27th August following; that whilst the vessel was at that island, the deceased made occasional excursions on shore, but always returned on board to sleep at night, and he believed that the deceased did not take the Abstract Book on shore with him, inasmuch as the same was, when not in use, almost always deposited in his writing-desk in his cabin, and he had no doubt that both the entries were written by the deceased when on board his vessel; that from Otaheite the vessel sailed to Callao, in South America, and on the 20th November, 1845, the deceased was seized with paralysis, and was put on shore at Callao, where he remained until the 5th December, when he resumed the command of his vessel, which on the same day sailed for England; that about the 12th December, the deceased rebuked the deponent for having omitted to place some paint-brushes in water before putting them away, and said, "You must take care of every thing on board the vessel for Mrs. Thompson's sake;" adding, "My dear Hal, I feel very ill;" that on the 20th December, the deceased (then confined to his cabin), in answer to an inquiry of the deponent, said, "I feel very ill indeed; so ill that I feel there is something going to happen. If any thing does happen to me, do not leave Mrs. Thompson's side, my boy, until you see her under the protection of her mother. I have left Mrs. Thompson every thing, and you see that she receives every thing that I have left behind, and take care of all the stores in the ship for her." The deceased's effects were of the value of about £800.

Jenner, Dr., moved for probate of the two entries, as *Motion*. together containing the will of the deceased, to the widow, as executrix according to the tenour named in the first entry.

SIR H. JENNER FUST.—This will is not made according *Decree*. to the forms prescribed by the Wills Act: the question is,

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Thompson, dec.

Nov. 16. whether it is not valid as having been made by a mariner at sea. The only difficulty is, as to whether the brothers and sisters should not be before the Court.

Thompson, dec.

The first paper is a good and valid paper, although written in pencil, for other entries are made in pencil, and the expressions, "should any thing happen to me, Mr. George Herring,"—who was the broker of the ship,— "will pay himself; all other accounts to be paid by my dear wife, to whom I bequeath all I possess in the world," make her executrix according to the tenour, and the other entry (also in pencil) is confirmatory of what he had done before. The affidavit of the apprentice states that the deceased went on shore occasionally, but he never took the book with him on shore, and he always returned to the ship at night. Every thing concurs to confirm the disposition contained in the paper, and there are the declarations spoken to by the apprentice, that all in the ship should be for the benefit of his wife, to whom he had left every thing. The very last entry in the book is "God protect my blessed Mary!" and the next entry is in the handwriting of the wife, who appears to have been a very active person, and a very intelligent person, and to have been able to keep in order a very unruly crew. Every thing concurs to show what was the intention of the testator; and I decree probate of the papers, as containing his will, to the widow, as executrix according to the tenour.

Motion granted.

Jenner, Proctor.

4th Sess.

DECEMBER 4.

Where a testator, a barrister-at-law, had duly executed his will in 1843, and, at the foot of the attestation, wrote a codicil in 1846, which was not attested, and in 1847 wrote

IN THE GOODS OF RICHARD HUTTON, DEC.—*Motion, ex-parte.*—The testator, a barrister-at-law, of the Middle Temple and of Newcastle, died 11th June, 1847, having made his will, dated 22nd September, 1843, whereof he appointed his brother-in-law, the Rev. R. P., and T. T., executors. This will was duly executed and attested. At the foot of the attestation of the will he wrote a codicil in the following words:—"August 25th, 1846. Codicil. I hereby

except out of the legacies to my within-named executors all the household goods and furniture, which I request may be given to my dear wife absolutely. R. Hutton." This codicil was not attested. On the same side of the paper, the testator wrote another codicil, dated 31st May, 1847, wherein he appointed his brother, George Hutton, an executor and trustee, instead of his brother-in-law, the Rev. R. P., and which codicil was regularly executed and attested, but it makes no reference to the previous codicil of August, 1846, and both the attesting witnesses deposed that; at the time of executing the latter codicil, the testator did not in any manner allude to the previous codicil: one of them stated that he did not observe such codicil; the other deposed that he remembered to have observed the first codicil, with the signature of the testator thereto, and that it was unattested; but, owing to the weak and languid state in which the testator then was, and to the circumstance of his being a barrister-in-law, he did not call his attention to the fact of his signature being unattested.

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another codicil, on the same paper, which was duly attested, and which referred to the will, but not to the previous codicil: — Held, on motion, that the first codicil was not entitled to probate.

Blake, Dr., moved for probate of the will with the Motion. two codicils. As the testator could not write after the 31st May, 1847, the codicil of 25th August, 1846, must have been written before the execution of the attested codicil.

THE SURROGATE (SIR JOHN DODSON).—I am afraid I cannot decree probate of the first codicil, which is not executed pursuant to the Statute. It is true, it is written upon the same paper, but it is not referred to in the last codicil, which refers to the will, and the will only.

(The codicil of 1846 excluded from the probate).

Jenner, Proctor.

Judicial Committee of the Privy Council.

DECEMBER 10.

A codicil, **MICHELL v. THOMAS.—Appeal.—Cause.**—This was an appeal from a decree of the Prerogative Court of Canterbury, in a suit respecting the validity of a codicil to the will of Mr. William Michell, of Comprigney, Kenwyn, Cornwall, who died 5th February, 1845, aged sixty-nine, leaving Elizabeth Cornish Michell (his second wife), his relict; William Michell, the Appellant, and Mary Testrail (wife of Mr. John Testrail), children by his first wife, and Elizabeth Thomas (wife of Mr. Richard Thomas), the Respondent, his daughter by his second wife and widow. His property amounted to about £25,000.

On the 9th December, 1844, he duly executed his will, whereby he devised and bequeathed to his wife (widow) the freehold and leasehold property of her father and mother over which he had any power of disposition; a legacy of £500, and an annuity of £100; his dwelling-house at Comprigney, his furniture, linen and books, for life, and at her death or second marriage he devised the said dwelling-house to his daughter, Elizabeth Thomas, for life, and at her death to her children, and if there be no child, to his son, William Michell; he likewise bequeathed to Mrs. Thomas the household furniture, after the death of the widow; also £3,500, and one-third part of ten and two-fifths 128 shares of the East Wheal Rose Mine; he bequeathed to his daughter Mary Testrail an annuity of £20 for life, for her separate use, and to her six eldest children £250 each, when they attained twenty-five; and he gave the residue of his real and personal estate to his son, William Michell, whom he appointed sole executor.

On the 19th January, 1845, he duly executed a codicil, bequeathing certain sums, to which he had become entitled, to his brother, in trust for the children of his sister, and containing the following direction:—"Whereas I have given to my daughter Mary an annuity of £20 during her life;

now my wish is that my son William should allow her, during her life, out of the property which I have bequeathed to him, an annuity of £30 (which, with the said annuity of £20, will be £50 a year), the same several annuities of £20 and £30 during her life not to be subject to the debts or control of her husband, and my said daughter Mary is not to anticipate the same in any way; and as to the said annuity of £30 to be allowed by my said son William, I desire that, if my said daughter should anticipate it in any way, or do any act so as to give the right or enjoyment of it to any other person whomsoever, then my said son William shall dispose of the said annuity of £30 in any way he shall think best for the benefit and advantage of my said daughter Mary during her life." This codicil was attested by Mr. Richard Thomas, the testator's son-in-law, and Mary Clatworthy, his servant.

The codicil in question bore date 22nd January, 1845, and was to the following effect:—

This is a second codicil to the will of me, William Michell, of The Comprigney. In my will, I have given to each of the six children of my daughter Mary £250, to be paid to them respectively when they attain the age of twenty-five years, and if any of them should die under the age of twenty-five years, then that the share or shares of the child or children so dying under that age should go over and belong to the survivors and survivor of them, to be paid to them, or him, or her respectively, at the same age; and I have directed that the moneys so given to the said children, amounting to £1,500, shall be invested in government securities by my executor: now I revoke so much of my said will as requires my said executor to invest the said sum in government securities, and I hereby declare that he shall be at liberty to invest the same in government or any other securities, or to keep the same in his own hands, as he shall think fit, and that the interest, as stated in my will, shall be duly paid as therein directed: I revoke my bequest to my daughter Elizabeth relative to East Wheal Rose Mine, and in lieu of it I now bequeath to her two 128th parts or shares of and in the said mine. All my other shares in the said mine I give to my son William absolutely.

An Allegation, in the *Condidit* form, on behalf of Mr. Michell, the executor, pleaded the making and execution of

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the codicil; upon which the two subscribed witnesses, James Hicks and Mary Clatworthy, were examined.

The former, groom and coachman of the testator, deposed that, for the three weeks or so preceding his death, he had been confined to his bed; that he saw him two or three times whilst so confined, when he was very ill, too weak to get into bed of himself; he did not speak and his breath was very short. The second time he saw him, Mr. William Michell had come to the witness's bed-room, about five o'clock in the morning, and called him out of bed; he had a paper in his hand, and told witness to get up as quick as possible to come to his master's bed-room to sign a paper; the witness asked him how his master was, and he said "Very ill." The witness got out of bed immediately and followed Mr. William Michell to the room of the testator, who was sitting up in his bed propped up with pillows. There was in the room, besides Mrs. Michell, Dr. Thomas (Mr. Richard Thomas), the testator's son-in-law, who had been at the house attending him the whole time he had kept his bed. When the witness and Mr. William Michell entered the room, the latter went to the side of the bed and gave the testator the paper into his hand to read, and held a candle to him for him to see, but he did not say any thing then, nor did the testator, who held the paper up before him for about a minute, and looked as if he was reading it. He then put it before him on the bed, and Mr. William Michell gave him a pen into his hand. The testator made a kind of motion with his hand as if to ask for the pen, but he did not say any thing, nor did Mr. William Michell in giving the pen. The testator appeared to write upon the paper, and Mr. William Michell then told him to say some words, and he said something. His voice was very weak. Mr. William Michell then took the paper and brought it to a little table at the foot of the bed, and told the witness to put his name to it, which he did. He did not notice what the testator had written on the paper, whether he had signed his name, or what. When the witness had signed, Mr. William Michell told the housemaid, Mary Clatworthy (who had come into the room with the witness, and had been

present all the time), to sign her name to the paper, and she did so. Mr. William Michell then told him and his fellow-witness they might go, and they left the room. He did not know what paper it was. "Whether master at the time the paper was signed was quite sensible or not," the witness continued, "I cannot say; his appearance, I thought, was very wild, his eyes looked very glassy, and his breath seemed very short, but still he seemed to know how to put his name to the paper very well. He seemed to me to ask for the pen, not I think by word, but by making the motion with his hand, and when he got the pen in his hand, he wrote on the paper of his own free will: nobody assisted him to write. Whether he knew the contents of the paper I cannot tell. He could not have read it in the time he held it before him; indeed, he could not read by candle-light without his glasses; I had heard him say so many times, and I have been into the room of an evening and seen him reading with glasses on, and at the time I have been speaking of he had not his glasses on." The witness further deposed, upon interrogatory, that the testator was a person of peculiar temper and eccentric habits, and of an excitable and irritable disposition; that Mr. William Michell was educated for the law, and had been in practice as a barrister; that he (witness) had frequently heard the testator express dissatisfaction with Mr. William Michell, and had very often seen him shew resentment towards him by his talk to and of him, though Mr. William Michell was a good deal more with the testator during the last three weeks than he had ever before been in the witness's time; that Mrs. Thomas was the favourite child of the testator, who, up to the time of his death, treated her with the greatest affection, and he evinced a strong partiality and regard for Mr. Thomas, her husband. The testator was subject to attacks of difficulty of breathing, which generally seized him about two o'clock in the afternoon, and about the same hour in the morning. When the paper was signed, the testator was in a state of great exhaustion; his eyes were then fixed and glassy, and his whole countenance was changed, and it was generally supposed that he was dying: before the paper was signed,

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he sent for his wife. He was evidently suffering from the effects of some very bad attack at the time his signature was affixed to the paper. Whilst the witness was in the room, the testator did not say one word the witness could understand. His eye-sight was much impaired; he was not much in the habit of reading by candle-light; it was with difficulty he could do so. He had not time to read the paper, for he had it in his hand about a minute only.

The other witness deposed that, about five o'clock in the morning of January 22nd, being sent for by Mr. Wm. Mitchell, she entered the testator's room, where Dr. Thomas and Mrs. Mitchell were; Mr. Wm. Mitchell entered the room at the same time, and James Hicks. Mr. Wm. Mitchell, having a paper in his hand (which the testator afterwards signed), went up to the bed-side, and gave it to the testator, who took it in his hand. Neither, as far as she recollects, said any thing. The testator looked at the paper while he held it in his hand, which was not more than a minute, and then Mr. Wm. Mitchell gave him a pen to sign it, and the testator put the paper down before him on the bed, and signed his name to it. She thinks Mr. Wm. Mitchell named to him to sign it; he pointed out the place for him to put his name, and held the candle to him while the testator had the paper. The witness and Hicks stood at the foot of the bed as the testator signed the paper; Dr. Thomas, who stood there also, told them to "come forth;" that was about the time the paper was given to the testator. Mr. Wm. Mitchell told the testator some words, which he repeated, just as he was going to sign the paper. She and her fellow witness then subscribed the paper (not knowing what it was) and left the room. The testator looked at it, apparently, as he held it in his hand, but she does not think he read it; he could not, she thinks, have read it all, as he had it in his hand not above a minute before he signed it. Whether he was of sound mind or not at the time, she could not tell; he did not say or do any thing from which she could tell whether he was or was not. He was very weak, very much more weak than when she saw him sign the previous paper (which she had also attested), and he had been getting worse

and worse all the time; his eyes were glazy. His attacks were very much of a night, and they left him weak and exhausted.

The sentence in the Court below was as follows:—

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SIR H. JENNER FURT.—It appears that Mrs. Thomas would have taken under the will an absolute interest in £3,500, and also one-third of the shares which the deceased possessed in the East Wheel Rose Mine, ten in number, which are valued at £1,500 each. The general effect of the first codicil was to increase Mary's annuity from £20 to £50. That codicil (which does not affect the interest of Mrs. Thomas, though it does in some degree that of the other daughter) was attested by Mr. Richard Thomas (who was the testator's medical attendant as well as his son-in-law), and that fact goes to shew that, on the 19th January, 1845, the deceased had testamentary capacity; but no evidence is produced to shew under what circumstances the instructions were given,—whether with the knowledge of the widow and Mr. Thomas, or whether it was read over to the deceased. Under the second codicil, it is clear that a positive benefit is given to the son, William Michell, which will amount to at least £2,200, to the prejudice of his half-sister, Mrs. Thomas.

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May 15.

For the purpose of considering the proof of this codicil, we must first inquire whether there was any great improbability in this alteration. In 1844 he had made a will providing for his daughter; he had confirmed that disposition, expressly or not, by the codicil of the 19th January, 1845: therefore, he had then no intention of making an alteration in that provision, however capricious he may have been, and whatever difference there may be between the wills of 1840 and 1844.

Now what do we hear of this second codicil? Why, nothing Evidence. at all; nobody hears any thing of this codicil except Mr. William Michell, so far as appears from the evidence, until half-past five o'clock on the morning of the 22nd January, when the servants were called up to attest its execution, the draft being in the handwriting of the person to take the

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Evidence.

benefit under it, and having been communicated by him the preceding day to a solicitor at Truro, by whom the codicil was drawn up.

The witness, James Hicks, who was groom, and acted as coachman to the deceased, after stating that the deceased had been confined to his bed for about three weeks, says: "Mr. William Michell, who had been staying at the house while master was confined to his room, came to my bed-room, and called me out of bed, about five o'clock in the morning. He had a paper in his hand, the paper I afterwards signed. He told me to get up as quick as possible, and come to my master's bed-room to sign a paper." So I presume, whatever might be the nature of the disorder he was suffering under at this time, he was in a state that made it necessary that the codicil should be executed without delay; otherwise, at five o'clock in the morning, in January, the servants would hardly have been called out of bed to see a codicil executed by their master. "I asked him how master was, and he said 'Very ill;' but that is all, I believe, that passed. I got out of bed immediately, and slipped on a few of my things, and then accompanied Mr. William to my master's room. I found master sitting up in his bed, propped up with pillows. There was in the room besides, my mistress, Mrs. Michell, and Dr. Thomas,—Mr. Richard Thomas, of Penzance,—who had married master's daughter. He is a medical gentleman. He had been at the house attending master the whole time he had kept his bed, and a great deal all through his illness. When we went into the room, young Mr. Michell,"—the son who prepared the codicil in the first instance,—“went to the side of the bed, and gave master the paper into his hand to read, and he held a candle to him for him to see. He did not say any thing then, as I recollect, nor did my master. My master held the paper up before him for about a minute, and looked as if he was reading it. He then put it before him on the bed, and young Mr. Michell gave him a pen into his hand. Master made a kind of motion with his hand, as if to ask for the pen; but he did not say any thing. Young Mr. Michell did not say any thing that I heard in giving master the pen.

Master took it and wrote what I believed to be his name to the paper before him : at least, as I stood at the foot of the bed, I saw his hand moving on the paper, as though he was writing on it. Young Mr. Michell then told him to say some words—I did not catch what the words were,—and master spoke the words ; at least, he said something which I took to be them. His voice was very weak, and he spoke so low that I could not catch what he said. Young Mr. Michell then took the paper and brought it to a little table at the foot of the bed, and he told me to put my name to it at the bottom, and I did so."

Observe then the manner in which, this witness says, the codicil was executed. He did not hear it read. The deceased held it in his hand, for about a minute, as if he was reading it. Consider, too, the state of the deceased ; he was propped up in bed, at half-past five o'clock in the morning, in the month of January ; his eye-sight, it is proved, was impaired, and as he had not been in the habit of reading by candle-light, it would have occupied him considerably more than five minutes to read the codicil. The witness says : "I did not notice the paper at all, for Young Mr. Michell seemed to be in a hurry, as he told me to put my name to it, and I had not time, therefore, to take any notice of the paper. I just saw there was writing upon it, and that is all. I did not notice what it was master had written on it, whether it was his name or what it was. When I had signed my name to it, Young Mr. Michell told the housemaid, Mary Clatworthy, to sign her name to it also, and she did so. She had been present at all I have been describing. She had come into the room at the same time with me. I believe young Mr. Michell had fetched her as well as me. She stood alongside of me at the foot of the bed, and saw master write what he did, or seemed to do, on the paper. It was in our presence he wrote it, whatever it was, and she and I both afterwards signed our names to the paper, as I have described, at the little table at the foot of the bed. It was in master's presence we so signed the paper, but our backs were towards him as we wrote our names. When we had written our names, young Mr. Michell told us that that

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would do, and that we might go, and we left the room. Nothing else was said or done to my recollection while I was present. I did not know the contents of the paper; I did not know or hear what paper it was; I do not know now. Dr. Thomas and my mistress were present all the time; they did not take any part; Dr. Thomas stood alongside of us, at the foot of the bed, looking on only. My mistress, I don't think, saw any of it; for she was in great distress, and buried her face in her hands." In the latter part of his deposition in chief, he says: "Whether master at the time the paper was signed was quite sensible or not, I cannot say. His appearance I thought was very wild; his eyes looked very glassy, and his breath seemed very short; but still he seemed to know how to put his name to the paper very well. He seemed to me to ask for the pen, not I think by word, but by making the motion with his hand; and when he got the pen in his hand, he wrote on the paper of his own free will; nobody assisted him to write. Whether he knew the contents of the paper I cannot tell; he could not have read it in the time he held it before him; indeed, he could not read by candlelight without his glasses. I had heard him say so many times; and I have been into the room of an evening; and seen him reading with glasses on, and at the time I have been speaking of, he had not his glasses on. Whether he actually knew what he was about when he signed the paper, I cannot tell."

"This is the account given by this witness of the execution of this paper: he is brought to the deceased's bedroom at half-past five o'clock in the morning; the witness has not time to see what the deceased had written on the paper; and this is the proof not merely of the capacity of the deceased, but of his volition, and knowledge of the contents of a paper which, from all that appears, he had never seen before."

"I know it is said that the Court is not to presume fraud where there is no proof of it; but the Court has a right to ask for adequate proof of a paper which is prepared by a party for his own benefit. Here is an entire absence of proof of knowledge of the contents of the paper; it is put into the

deceased's hand for a minute, and he seemed to be looking at it, but nothing more. He appeared to be reading it, but of the contents he might be as ignorant as before the pen was put to the paper, or instructions were given to this gentleman for the preparation of this paper.

This and the other witness knew nothing of the reading over, or whether Mr. Thomas knew the contents; but, if his presence is to be a sanction to the execution, something should be made out in the way of proof that he was cognizant of the effect of the instrument, which the Court is to pronounce for in consequence of his having been present, and able to protect the deceased against any imposition. There might be many reasons why Mr. Thomas should be kept in ignorance of the contents: but, if he was aware of them, that fact must have been known to Mr. Michell, who takes upon himself the proof of the paper. I am not prepared to say that there is so great a doubt thrown upon the capacity of the deceased as might have been; but there is nothing from which the Court can conclude that the deceased knew the contents of the instrument, or that he gave instructions for its preparation. It is possible that his capacity may have been sufficient to do a testamentary act,—to make a provision for his son to a greater extent than he had done by his will, and to diminish the interest given to his daughter: though it is proved by all the evidence that the daughter by the second marriage was a great favourite; that he spoke of her in terms of the greatest affection, and that he sent for Mr. Thomas to be with him three weeks before his death, and refused for a long time to have any medical assistance but that of his son-in-law.

The disorder which eventually terminated his life, about three weeks afterwards, was shortness of breath,—dropsy, I suppose. He could not lie down on his pillow, and he suffered severe attacks about this time. When not suffering from these attacks, he was clear and intelligible. But it would seem from the hurry in which Mr. William Michell produces this paper, and from his calling up the servants, that this morning the deceased was in a very dangerous state, and it is proved by the witnesses that when he

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Condition of
the deceased.

DEC. 10. recovered from the attacks, he was in a state of very great exhaustion; so that something should be shewn of previous intention, of knowledge of contents, or of reading over, of instructions, or of subsequent recognition: but not one title of this is to be found in the evidence.

The rule of law in these cases.

What is the rule of the Court in such cases as this? Why, that a party who propounds an instrument containing a disposition in his own favour is bound to furnish the Court with proof of knowledge of the contents by the deceased, which knowledge may be proved in a variety of ways: by shewing an intention to do the act, and that the act is in accordance with previous declarations; or by proof of reading over at the time of execution, or of some reference to the contents by the deceased, shewing a knowledge of them; or by proof of subsequent recognition. It is not for the Court to presume fraud, undoubtedly; but some proof of knowledge of the contents must be given in all such cases. This is the rule not only of this Court and of the superior Court of Appeal, but it is the rule of common sense.

Codicil pronounced against.

Under these circumstances, there being no proof of instructions, of reading over, or of knowledge of the contents *aliunde*, there being this hurried execution at half-past five o'clock in the morning, it would be the height of injustice to suffer such a paper to pass the probate of this Court. I am, therefore, of opinion that I must pronounce against the codicil, and decree probate of the will and first codicil alone. Let the costs be paid out of the estate. I do not pronounce that this is a case of fraud, but a case in which there is an absence of adequate proof.

From this sentence Mr. Michell appealed to the Judicial Committee of the Privy Council, before whom it was argued by

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Sir F. Thesiger, Q.C., and M. Smith, for the Appellant; and Bethell, Q.C., and Addams, Dr., for the Respondent.

JUDGMENT.

DR. LUSHINGTON.—This is a question as to the validity of a codicil, dated the 22nd January, 1845, called a second

codicil, to the will of Mr. William Michell, of Comprigney, in the parish of Kenwyn, Cornwall. It appears that the testator had executed a will on the 9th December preceding, and on the 19th January, 1845, he had executed a first codicil to his will. Neither of these instruments is disputed; the sole question in the Court below was, whether the execution of the second codicil was proved in the manner which the law requires.

It is not necessary to recite the contents of this codicil; it purports to make an alteration in the will previously executed by the testator, respecting the legacies bequeathed to the children of his daughter Mary, and to a certain extent to reduce the benefit conferred upon his daughter Elizabeth. The codicil is attested by two witnesses, both of whom appear to have been at the time in the service of the testator, and it was executed early in the morning (about five o'clock) of the day on which it bears date. This codicil was propounded by Mr. Michell, the son of the testator, and was opposed by the other parties in the cause, namely, Mrs. Thomas, the daughter of the testator, and her husband. It was propounded in what is technically called in the Ecclesiastical Courts a common *Candidit*, with a slight exception; that is, the first and second articles plead the making of the will of the 9th December, 1844, and the codicil of the 19th January, 1845, and the third article pleads more formally the directions for and preparation of the codicil, the reading over to and approval of it by the testator, the execution of it, the capacity of the testator, and so on. Now the party might, if so advised, have pleaded all the circumstances attending the making and execution of the codicil, in the manner in which they took place, and might have pleaded any reason or cause which led to an alteration of the will of the 9th December. But, for some reason not explained to the Court, they have confined their plea to a *Candidit*, on which no witness could be examined but the attesting witnesses, the persons present at the execution, and the drawer of the codicil. The drawer of the codicil being Mr. Michell, he could not be produced as a witness. But for the purpose of adducing facts subsidiary

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to the execution, and from thence of satisfying the Court which has to decide on the validity of the instrument that it was duly executed, with a full knowledge and approval of the contents, they might, as I said, have pleaded them in the original plea, or, as suggested by Dr. Addams, they might have brought in Additional Articles in the Court below, or they might have pleaded in this Court (in which an Allegation was asserted and abandoned) all the circumstances necessary to be brought forward as to the preparation and execution of the codicil. As they have not done this, the necessary conclusion of their Lordships must be that there were no previous instructions and no declaration, and that no evidence of recognition or knowledge of the contents of the codicil could be produced on the part of the Appellants. The result is, that the question is in precisely the same state in which it was argued before Sir Herbert Jenner Fust, namely, whether the evidence of the two subscribing witnesses to the codicil is sufficient in law to satisfy their Lordships that the judgment of the Court, below was erroneous, and that the codicil was duly executed. But as I use the term "duly executed," I do not mean merely the technical sense of it, — the fact of execution by the signature of the testator and the subscription of two witnesses, as required by the Statute; but I mean by the term "duly executed," proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument.

The law of
 the case.

Now with respect to the law upon this point, as to what proof is necessary in a case of this kind, I apprehend that no question has undergone so much argument and so much consideration as the nature of the proof which is required where the drawer of a will is the person materially and principally benefited by it. I apprehend their Lordships are unanimously of opinion that the law as laid down by Mr. Baron Parke, in the case of *Barry v. Bullin*,* is the law which they ought strictly to adhere to, and that law appears to be this: that, wherever an instrument has been

* 2 Moo. P. C. C. 480.

prepared by a person interested under it, you must give some evidence, of some description or other, to satisfy the mind of the Court that the testator knew and approved of the contents. There may, perhaps, have been some notion in former days that the evidence must be of some peculiar description, such as of reading over, or express approval; but this is not the law as laid down by Mr. Baron Parke in *Barry v. Bullin*; provided you can satisfy the Court by any evidence that the testator knew and approved the contents of the instrument, it is perfectly sufficient for the effect to be wrought out.

"Then what is this case? Here is no previous declaration, nor the slightest recognition; there is not one atom of evidence of any instructions ever being given by the testator himself; and therefore the Court is to extract from what passed at the time of execution, as deposed to by the witnesses, whether or not the testator knew the contents of the paper and adopted and approved of them. Now there is not one single expression deposed to by the witnesses, as far as I can find in their evidence, as coming from the testator himself. If, therefore, the evidence is sufficient, it must be sufficient on the ground that he had the codicil in his hand, and had the opportunity of reading it, and that he did read the codicil, and afterwards approved of the contents by the execution of it. But it does not appear to their Lordships that the testator ever did read the codicil, as far as they can judge from the evidence in the cause. It must be proved to their Lordships' satisfaction by some evidence that would lead them to the conclusion, that the testator did know and approve the contents of the codicil; but from the evidence before us there is no *medium concludendi* that he did know and approve the contents. Such cases have occurred over and over again, and it is not a case in which the Court is called upon to say, or would presume to say, that the person propounding the codicil has been guilty of any offence, moral or otherwise; but, unfortunately for himself, he has not produced the proof which the law requires, and such as their Lordships are all of opinion is demanded by the rule to which we are bound strictly to adhere.

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Judgment below affirmed.

It being so, we are under the necessity of affirming the judgment of the Court below.

LORD BROUGHAM.—There is no reflection upon the party.

LORD CAMPBELL.—There is only a deficiency of proof.

LORD BROUGHAM.—As the learned Judge in the Court below held, there is a deficiency of the necessary proof.*

Proctors:—*Nelson*, for the Appellant; *Wadeson*, for the Respondent.

Prerogative Court of Canterbury.

Bye-Day.

DECEMBER 13.

Where an erasure and interlineation, unattested, appeared on a will, and the attesting witnesses could not depose whether or not the alteration was made before execution, the Court refused to decree probate with the words which persons skilled in writing had "no doubt" had been erased.

IN THE GOODS OF GEORGE ABBEY, DEC.—*Motion, ex parte.*—The deceased died 13th August, 1847, leaving personal estate under £3,000. In his will, dated 6th April, 1840, there is an erasure, with the word "fifty" written upon it, being a legacy to Major Abbey, the deceased's brother. No positive evidence could be adduced as to the existence or non-existence of the erasure at the time of the execution of the will (which is in the testator's handwriting), the attesting witnesses being unable to depose whether the word "fifty" was or was not written upon the erasure at the time of the execution. The widow, the sole executrix and residuary legatee, who was not aware of the existence of the will until after the testator's death, was willing to take probate of it as it now stood; and Major Abbey, the legatee, consented to the issuing of the probate with the alteration.

Nov. 6.

The Court rejected a Motion for probate of the will as it stood, the Judge intimating that he thought the word or

* The Committee consisted of Lord Brougham, Lord Langdale (M.R.), Lord Campbell, Dr. Lushington, and Mr. Pemberton Leigh.

words obliterated might be ascertained. An affidavit of Mr. Joseph Netherclift, lithographer and fac-similist, was produced, in which he made oath that he had twice made a careful and minute examination of the erasure, with a view to ascertain what word or words were written in the will prior to the erasure, and that from a lengthened and careful inspection of the will, and from a careful and minute admeasurement and comparison of certain indentations and certain minute but perceptible vestiges of ink-writing appearing in the erasure, with certain words and letters appearing in other parts of the will, he is enabled to depose with confidence that the words which originally stood in the will were "two hundred," the word "two" having been commenced with a small, and the word "Hundred" with a capital letter; for that he had, with the aid of a magnifying-glass, discovered in the erasure vestiges of several letters appearing to have formed part of the words "two Hundred," written in the peculiar style and character of the handwriting of the general body of the will, and which could not have formed component parts of any other words except of the words "two Hundred;" and he has no doubt whatever that the words "two Hundred" were the words originally written where the erasure now appears.

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Abbey, dec.

THE COURT was thereupon moved for probate of the will Nov. 26. with the words "two hundred" inserted where the erasure appeared; but it rejected the Motion, and directed that, if no further affidavit was produced, the probate should go out in blank.

A further affidavit was accordingly produced from Mr. Henry Adlard, engraver, who made oath that he is well skilled in deciphering writings and written documents, and that he had made a careful and minute examination of the erasure, with a view to ascertain what word or words were written in the will prior to the erasure, and that from such careful and minute inspection and examination, aided by a magnifying-glass and a mirror (the latter to reflect the sun strongly upon the paper), he has satisfied himself, and is enabled now to depose, that the words which were originally written where the erasure now appears were "two Hundred,"

Dec. 13. the word "two" beginning with a small, and the word
Abbey, dec. "Hundred" with a capital letter, and that vestiges of the
 ink-writing of the first letter of the word "two" are perceptible in the erasure, from which it appears that such letter was formed in a precisely or nearly similar manner as the second letter "t" in the word "Testament," appearing in the will, and that vestiges of the ink-writing of the second letter "w" are perceptible underneath the first letter "f" in the word "fifty" written upon the erasure, and that from a minute inspection of the erasure the deponent has no doubt that the third and last letter of the word was written underneath the letter "i" in the word "fifty" in the erasure.

Dec. 13. *Bayford, Dr.*, renewed the Motion.

DECREE. SIR H. JENNER FUST.—I cannot receive this affidavit; it is not made fairly; conjectures are formed by the party. I cannot decide upon them. The paper must be propounded. [*Bayford*.—The Statute says that no unattested alteration made in a will after execution shall have any effect, "except so far as the words or effect of the will before such alteration shall not be apparent."] How do you make it apparent? It is going much too far. I have some doubt whether it ought not to be apparent on the paper itself, without any other aid; but that has been overruled. But it is not sufficient for the deponent to say he "has no doubt." The party must either take probate in blank, or propound the paper. I cannot receive these affidavits.

Motion
 rejected.

(Motion rejected.)

Bayford, Proctor.

A domiciled IN THE GOODS OF GEORGE HOWARD, DEC.—*Motion, ex-*
 British subject, dying in Nor-*parte*.—The deceased, late of Mirtley, in Essex, and of New
 way, having Hellesound, in the kingdom of Norway, died at the latter
 made a will, place 20th March, 1847, leaving a will, of which the follow-
 purporting to ing is a copy :—
 be limited to
 his property in
 Norway (the
 testator having
 Mr. George Howard's will.
 All my properties in Hellesound and at all places in Norway

furnitures dinner plate glas and of all description whatever every thing included I leave in trust to Stephan Russel junior the half as his part, a quarter to Daniel Howard and the other quarter to Charles Warner to sell dispose or part it equally.

All my standing out in this Country I leave to Stephan Russel and his wife and out of which Sum they have to pay all just Claims on me as well as my funeral expenses.

All Stores and Ship furnitures belonging to Mr. James Howard to be delivered to him.

No debts due to me to be forced before the expiration of twelve months.

That part which Stephan Russell and his Wife according to the above is to have to be laid out in public funds and if they die without issue such part to belong to her Mother Mrs. Allan the Wife of John Allan.

Mr. Stephan Russell is to pay my Servant maid Louisa one hundred specie dollars twelve months after my decease. The Small Sum due from Mr. Hansen Mr. Lecré and Mr. J. Lund at Christianssand I do not allow to be paid by or demanded from them.

This above so done with my full Sense and in the présence of the Witnesses hereunto signed.

Christianssand 20th March 1847.

Witness

Georg Howard.

Albert S. K. Thomessen

G. T. Christensen.

The original will is registered in the proper Court in Norway, and the effects of the deceased in that country have been administered according thereto. He also left property in this country, to which, his next of kin were advised, the will does not apply. The deceased died a bachelor, without a parent, leaving brothers and sisters, nephews and nieces; and Mr. James Howard, one of the brothers, under advice that the deceased has died intestate as to his property in this country, applied for Letters of Administration limited to such property.

Addams, Dr., upon this state of facts, moved for a Decree *MOTION*. citing the legatees named in the will to shew cause why Letters of Administration so limited should not be granted to Mr. James Howard, as the brother and one of the next of

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Howard, dec.

property likewise in this country), under which his effects in Norway had been administered, — the Court granted a Decree citing the legatees in such will to shew cause why administration limited to the effects in this country should not be granted to a next of kin.

Dec. 13. kin of the deceased. If the Court is of opinion that the will is limited to the property in Norway, there is no necessity for citing the legatees.
Howard, dec.

Decree. **SIR H. JENNER FUST.**—I see no objection to the Decree issuing. I think the Decree ought to issue. But he was domiciled British subject, and there are two witnesses' names subscribed to the will. Let the Decree issue in the form prayed.
Motion granted.

Wadson, Proctor.

Where the signature to a will was made by another person than the testator, by the direction of the latter, and the clause of attestation did not specify whether the subscribing witnesses attested the name of the testator, or that of the writer of it, signed in the attestation-clause, the Court dispensed with an affidavit, on the objection of the executor, and decreed probate.

IN THE GOODS OF GEORGE COOPER, DEC.—*Motion, ex parte.*—The deceased died 20th July, 1847, leaving a will dated 16th of the same month, whereof the Rev. M. T. F. is sole executor. The will purported to have been executed in the presence of two witnesses, and to have been signed for and by the direction of the testator by John Drummond, the clause of attestation being as follows :—“Signed by me, John Drummond, by the direction of the testator as his last will and testament, John Drummond, in the presence of us, who were together present at such signing, and in the presence of the testator, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses, the interlineation between the third and fourth lines of the second page having been first made.” And then is written, in John Drummond's hand, the deceased's name, “George Cooper.”

The executor contended that the attestation-clause is sufficient to satisfy the requirements of the Wills Act, and objected to furnish further proof of the execution of the will, except under the direction of the Court.

Motion. **Harding, Dr.**—The Statute requires that the will shall be signed by the testator, or by some other person in his presence and by his direction, and that “such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator.” It would seem that “such signa-

ture" means whether made by his own hand or by another person. I submit, therefore, that this is a sufficient *bonâ fide* acknowledgment, although the word "acknowledged" is not in the attestation-clause. [PER CURIAM.—Is it the signature of "John Drummond," or "George Cooper," which the witnesses attest? That is the difficulty and the objection to the attestation-clause,—the difficulty of knowing which signature the witnesses attested.] "John Drummond" in the attestation-clause would, *primâ facie*, not be the signature; but "George Cooper," if there was no attestation-clause at all, would be the signature, whereas if "George Cooper" had not been there, there would be some doubt. If the witnesses attested any signature, they attested one as much as another. There is no ground in the attestation-clause for supposing that they did not attest "George Cooper." [PER CURIAM.—The question is, whether they did attest "George Cooper."] The law and common sense would infer that it was "George Cooper," and not "John Drummond" in the attestation-clause.

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Cooper, dec.

SIR H. JENNER FUST.—It appears to me very doubtful which signature they appear to have attested. I cannot think it is a very great hardship for the party to produce an affidavit shewing that "George Cooper" is the signature which the witnesses attested. It does not, I confess, appear to me clear, on reading the attestation-clause. "John Drummond," in the body of the clause, is written in a much larger hand than "Signed by me, John Drummond." The rule is made for the benefit of parties. However, decree probate of the will. Motion granted.

Wadson, Proctor.

IN THE GOODS OF CAMILLA LOWREY, WIDOW, DEC.—A paper, not described as *Motion, ex-parte*.—The deceased died in October, 1847, leaving two testamentary papers executed under the following circumstances. On the 21st October, being ill in bed, she expressed to Mrs. Nash, her niece, a desire to make her will, whereupon Mrs. Nash, by her instructions, wrote, in executed and attested, and a list of articles,

Dec. 13. her presence and that of her maid servant, Jane Stock, the following paper (A) :—

Lowrey, dec.

It is my wish that £10 each should be given to my sisters for mourning, and £5 to my nephew, R. M., and £5 to my niece, H. C. N., and all that was my sister's to be divided among her nieces and nephews, and all my property, furniture, books, and plate (not given to Jane), to be divided between my sisters and their children; Ellen to have a present of a year's wages; James's wages to be paid before any thing else. I desire that £50 should be given to Jane, in addition to her wages, which are £20 per annum.

Mrs. Nash then, of her own will, added in the right-hand corner of the paper: "This was the wish of my dear aunt, Farnham, Surrey, Thursday, Oct. 21st, 1847;" and immediately afterwards, by the deceased's desire, wrote (in continuation of the bequests), "I wish the kitchen furniture, crockery, and glasses to be given to Jane Stock. I wish all my clothes to be given to Jane, except the black India shawl." The paper was then signed by the deceased (who wrote her signature upon the word and name "to Jane"), Mrs. Nash and Jane Stock duly attesting the same, the former first prefixing the word "signed" to the deceased's signature, and the words "witnessed by" to the intended signatures of herself and Jane Stock. Immediately after such execution, Jane Stock produced a slip of paper (B), which contained a list of various articles, and the deceased having stated that the things mentioned on the first side of it (which first side is in her own handwriting) were to be given to Jane Stock, and expressed a desire to make certain additions thereto, Mrs. Nash, at the deceased's dictation, wrote a list of articles on the other side of the paper (across some writing, being a note addressed to the deceased), and having dated it "October the 21st, 1847," gave it to the deceased, who signed her own name on the second side upon the word "toast-rack" (several articles being below the signature), the two witnesses duly attesting the same, and subscribing their names. Shortly afterwards, Mrs. Nash, on looking through the paper (A), in the deceased's presence, observed that she had omitted the bequest of books

which the deceased had mentioned, and she inserted the words "and books" before the words "and plate," and in order to make clearer the exception of the articles given to Jane Stock from the general disposition, inserted the words "as per list annexed" after "not given to Jane," and also wrote at the bottom of the paper, "The list above to be given to Jane Stock." Mrs. Nash then left the deceased, taking with her the two papers (A) and (B), and when in another room, wrote at the top of (A) the words: "It is my wish to give £10 to the Bishop and Mrs. Sumner," though not authorized to do so, "being in some doubt what were her aunt's wishes in regard to a proposed bequest to the Bishop of Winchester and Mrs. Sumner," who was a niece of the deceased. The property was under £450.

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Lowrey, dec.

Haggard, Dr., moved for administration of both papers **MOTION.** (with the exception of the words added by Mrs. Nash after the execution, and of all the words appearing below the signatures of the deceased), as together containing the will of the deceased, to the sister, one of the residuary legatees.

SIR H. JENNER FUST.—I have a good deal of difficulty **DECEE.** in saying what was written before the signature in paper (A), and with respect to the other paper (B), it is most difficult for the Court to know what to do with it. This paper purports to dispose of various small articles, one side being written by the deceased and the other by Mrs. Nash, and the signature of the deceased is about three parts down the second side, upon one of the articles. I cannot go below the signature. The deceased might just as well have signed at the bottom as where she did. She must have been nearly blind. [*The Registrar.*—Are the words "This was the wish of my dear aunt" to stand?] Yes; they were written before the execution of the will.

Administration decreed as prayed.

Motion
granted.

Moore, Proctor.

IN THE GOODS OF PARTON HAINS, DEC.—*Motion, ex-* A codicil, executed in duplicate, whereof
parte.—The deceased died 26th October, 1847, possessed of

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Hains, dec.

one part was destroyed and the other part retained by the testator until his death, the destruction of such part being contemporaneous with the execution of another substituted codicil,—excluded from probate.

personal estate under the value of £5,000. He left a will, dated 21st May, 1836, which was prepared by the deceased's London solicitors, and executed in London. In 1839, a codicil was prepared by his solicitor at Devonport (where the deceased then resided), and executed there on the 17th May, in duplicate, one part being kept by the solicitor, at the deceased's desire, and the other was taken away by the deceased, on his leaving Devonport for London shortly after its execution. In November, 1845, being again at Devonport, the deceased gave instructions to the same solicitor to make certain alterations in the bequests contained in the paper of 1839, viz., to revoke a legacy of £50 to S. G., and to substitute another person as trustee of a legacy to S. E. G., in the room of G. G., her father, who was dead, and to omit a legacy given to G. G. The solicitor carried out these instructions by preparing the codicil of 1845, as a substitute for that of 1839; and after the execution of the former, the deceased burnt the duplicate part of the paper of 1839, in the possession of the solicitor, but the other part was found, after his death, in his possession, inclosed with the will in the envelope originally belonging to the said paper, and in which (from the note indorsed upon it) the deceased seems to have placed his will on his leaving Devonport shortly after the execution of the paper of 1839. The codicil of 1845 was in the possession of the solicitor at the time of the deceased's death, inclosed in an envelope.

MOTION.

Deane, Dr., moved for probate of the will, with the codicil of 1845 alone.

DECREE.

SIR H. JENNER FUST.—The deceased never could have intended that the codicil of 1839 should have effect after the execution of that of 1845 (one of the legatees being dead), and the *prima facie* presumption is that, by the destruction of one part of the codicil of 1839, he intended to do away with the effect of that codicil. I have no hesitation in decreeing probate of the will of 1836 and the codicil of 1845.

Motion
granted.

Moore, Proctor.

CLOGSTOUN AND CLOGSTOUN v. WALCOTT AND OTHERS.

DEC. 13.

—*Cause.*—This was a suit respecting two codicils to the will of Mr. Edmund Walcott, who died 28th February, 1847, a bachelor, without parent, leaving two brothers, two sisters, and nephews and nieces, the children of two deceased sisters. He left a real estate, value £22,000, and personal property amounting to £17,000. He made a will in 1840. On the 12th May, 1842, he made a codicil to this will (its purport being to give legacies to two nieces), and on the 7th October, 1842, he executed another codicil, whereby he bequeathed a small annuity to a servant. On the 19th April, 1846, the deceased, in conversation with his brother, Captain Walcott, on the subject of his will, expressed his disapprobation of the will as it stood, stating that he should have a new will made; and desired his brother to fetch his will, which, after some further conversation, he threw into the fire, and it was entirely consumed. At the moment he did this, he expressed anxiety about the codicils, observing, "It will not affect the codicils, will it?" Captain Walcott replied, he thought not. In May, 1846, the deceased declared he had left legacies to his nieces, and in December, 1846, he again declared that, though he had destroyed his will, and meant to make a new one, if he failed to do so, he had made a provision for them, and that the paper would be found locked up in a box. After the deceased's death, the codicils in question were found in a box in which he kept papers of moment and concern, and they were the only testamentary papers left by the deceased.

A Motion was made for probate of the two codicils, on April 30. behalf of Captain Walcott (executor according to the tenour), who was desirous (against his own interest) to carry his brother's wishes into effect for the benefit of his nieces.

Harding, Dr., in support of the Motion.—The questions *Motion* are, first, whether, under the Wills Act, the destruction of the will is a destruction of the codicils at all; secondly, whether it is a destruction of them under the circumstances of this case. The words of the Act (sec. 20) are distinct and positive: "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, &c., or by the burning,

A testator, having made his will in 1840, and, in 1842, added two codicils thereto, in 1846, expressed his disapprobation of the will, which he threw into the fire, and it was consumed; expressing at the time of doing so his anxiety that the act should not affect the codicils, and subsequently a belief that the codicils were operative instruments:—Held, that the destruction of the will did not revoke the codicils.

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Walcott.

tearing, or otherwise destroying *the same*, by the testator, &c., with the intention of revoking *the same*." The policy of the Act is to make the execution of wills more difficult, and their revocation more difficult also. The impression of the deceased was, that he had provided for his nieces, and the remark he made on destroying the will clearly shews that he never thought of revoking the codicils. Although *prima facie* the destruction of a will may be the destruction of a codicil thereto, yet if the codicil be upon a separate paper, and if there be circumstances to shew that it was not the intention of the deceased to revoke it, the presumption is rebutted. *Medlycott v. Assheton*.* *Tagart v. Hooper*.† *Re Halliwell*‡ Here the circumstances are very strong, and probate is sought by the party applying for it against his own interest.

PER CURIAM.—The difficulty in this case is, that some of the next of kin are minors and others are abroad. Although it is true that it does not absolutely and necessarily follow that the destruction of a will is, under all circumstances, to be considered a destruction of a codicil to that will, with the exception of the case of *Halliwell*, I do not think that the Court has, at least since the Wills Act, on a mere *ex parte* Motion, in the absence of the parties interested, granted probate of a codicil to a will which had been destroyed. The circumstances in this case are certainly very strong, so far as appears from the affidavit; for at the moment the deceased destroyed the will, he expressed great anxiety that it should not affect the codicils, evidently shewing that it was not his intention to destroy them, but that they should be preserved and have operation, and there is no reason to suppose that he ever departed from that intention; on the contrary, it appears that he adhered to it, notwithstanding he may have meant to make a new will. But the Court is in this difficulty, that there are parties absent and parties who are minors, and the rule of law certainly is that, *prima facie*, the destruction of a will is a destruction of any codicils to that will. Here, as I said, the

* 1 Add. 229.

† 1 Curt. 289.

‡ 4 Notes of Ca. 400.

circumstances are very strong to shew that there was no intention on the part of the deceased to destroy the codicils, and if all the parties were before the Court, the Court might admit the papers to probate. But, under the circumstances, the Court must require them to be propounded, and if the parties are duly cited, the Court will be in a condition to have the case argued, either on behalf of both parties, or *in pœnam*, and if it should be of opinion either to admit or reject the codicils, the parties will have an opportunity of bringing the question before the Appellate Court. I am sorry to be obliged to do so, but I must reject the Motion for probate of the codicils, and direct that they be propounded.

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—
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Walcott.

The papers were accordingly propounded by the two nieces against the next of kin, who did not appear.

Harding, Dr., as before, supported the papers.

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SIR H. JENNER FUST.—I have no difficulty in this case, **JUDGMENT.** which is a question whether the destruction of a will is, under the circumstances, to be considered a destruction of two codicils to that will; or whether the codicils are entitled to probate notwithstanding the will to which they were originally codicils was destroyed by the deceased *animo revocandi*.

Nothing can be clearer than that, when the deceased destroyed the will, he expected that the destruction would have no effect upon the codicils. "It will not affect the codicils," he observed: so that his intention was not to destroy the codicils, but that they should operate, should he make no other will. If there are cases in which the Court has held that the destruction of a will is not necessarily a destruction of the codicils to that will (though *primâ facie* it is so), surely this case comes within the principle, for the deceased, at the time he destroyed the will, expected that the codicils would not be affected. Under the old law, the effect of destroying a will was, by presumption, to defeat the operation of the codicils to that will; but by the present law there must be an intention to destroy. Here, however, the

DEC. 13. *Clogstown v. Walcott.* deceased did not mean to destroy the codicils, which remain entire, but, on the contrary, he expected at the time, and declared afterwards, that the parties interested in the codicils would have the benefit of the legacies he had given them. I am of opinion that the Court is bound to pronounce for the validity of the two codicils, and I decree probate of them to the brother, who is executor according to the tenour in the first codicil.

Codicils pronounced for.

Ibbotson, Proctor for the parties propounding the codicils.

Consistory Court of London.

Bye-Day.

DECEMBER 15.

DEANE v. DEANE.—*Cause.*—This was a suit for a separation by reason of adultery by Mr. Henry William Deane against Louisa Anne Keppel Deane, his wife. The Libel pleaded the marriage of the parties on the 17th January, 1840, at Calcutta (Mr. Deane being at such time in the civil service of the East-India Company), the birth of two children, and cohabitation at the Cape of Good Hope, Calcutta, and finally at Mozuffernuggur (at which place Mr. Deane held an appointment), until the 13th April, 1843, when Mrs. Deane went, accompanied by her children, to Mussoorie, in the hills, being so advised by their medical attendant on account of the serious illness of their youngest child, since deceased; that Mr. Deane, being prevented by his official duties from accompanying his wife, made arrangements for her residence at Mussoorie in the family of Lieutenant B., who, with his wife, was about to proceed thither, both being friends of Mr. and Mrs. Deane; that, soon after the arrival of Mrs. Deane at Mussoorie, she commenced a criminal intercourse with Lieutenant T., and, her youngest child having died on the 22nd June, 1843, on

Divorce by reason of adultery by the husband against the wife.—Sufficiency of proof—confession—identity.

the 29th, she quitted the residence of Mr. and Mrs. B., leaving her other child; openly took up her abode with Lieutenant T., and for about a fortnight afterwards lived and cohabited with him in his dwelling-house there; that, as soon as she had gone to reside with Lieutenant T., in the afternoon of the 29th June, 1843, Mrs. Deane wrote the following letter to Mrs. B.—

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Dearest Mary, I feel all your kindness, and am most truly grateful to you for it, but to come back is impossible. I could not and will not do it. My little Harry I know you will take charge of and be kind to till I can hear from his father what he wishes to be done with him. Do not distress yourself on my account. I could never be happy if I returned. Forgive me for all the pain I am causing you, and believe me most gratefully yours, Louisa.

The Libel further pleaded that about a fortnight after Mrs. Deane had gone to live with Lieut. T., she was persuaded by her friends to leave him, and reside in the family of Mr. and Mrs. C. at Futtighur, Mrs. C. being a connection by marriage of Mrs. Deane, and she continued to reside with them from July, 1843, until January, 1844, when she went to reside with her eldest brother, an officer in the service of the East-India Company at Mominabad (in the territories of the Nizam), until the 14th May, 1844, when she quitted his house and went to reside with O., an officer in the military service of the Company at Mominabad; that before Mrs. Deane left Mussoorie and went to reside with Mr. and Mrs. C., she wrote and sent the following letter to Mr. Deane, her husband:—

I have vainly watched all day, Henry, for a line from you in answer to my note. Did you but know the anguish that I have suffered for the last week, you would indeed pity me. I think of all your love, your invariable kindness to me, and the base, the horrible return that I have made to you, till I am almost mad. Henry, dear Henry (for, notwithstanding all my ingratitude, I do still most dearly love you), can you, will you, forgive me? I would do any thing for that, for one kind word from you. I requested Mr. D. to write to you for me, but I cannot wait so long, knowing how you must hate and reproach me. Let me come to your house again, if only as a servant, to take care of your

Dec. 15, child. I have just heard from the C.'s; they offer me a home. Tell me what to do, and do not utterly cast me from you, Henry; you could not do so did you know my *deep, deep* remorse and repentance. Our poor child, think of him. If you look with scorn and contempt upon me, for *his* sake, listen to me. Think how happy we once were. I have endeavoured to do my duty as a wife and a mother, and, Henry, if you will let me, I will be a slave to you both. I will never leave you; I will shut myself up and try to do my duty as one who, though not worthy of *your* love, still loves you. Have I appealed to you in vain? God forbid! Write to me; on my knees I would beseech you to write, and tell me you forgive me; that you do not quite cast me from you forever, but that you will still have mercy on me, and pity me.

Louisa.

13th July.

It further pleads that Mrs. Deane carried on an adulterous intercourse with Mr. O., at Mominabad, and some time in the year 1844, she proceeded to Bombay, and from thence overland to England, under the assumed name of Williams, and arrived there on the 7th October, 1844; that, during her passage by sea from Bombay to Suez, she carried on an adulterous intercourse with M., an officer in the military service of the East-India Company, also a passenger, in company with whom she travelled from Cairo to Alexandria.

No evidence was given as to the alleged adultery with Mr. O. and Mr. M. No plea was given in on the part of the wife, nor were the witnesses examined upon the Libel interrogated on her behalf.

ARGUMENT.

Sir J. Dodson, Q. A., for the husband.—I admit that there is no proof of adultery at Mominabad, or on the passage home; but there is sufficient proof of adultery with Lieut. T. at Mussoorie. The evidence of Mrs. B., who is a cousin of Mrs. Deane, is to this effect. Mrs. Deane left their house at Mussoorie about the end of July, 1843, and went to reside at the house of and with Lieut. T., an officer in the same regiment to which the witness's husband belonged, and who, like the other officers at Mussoorie, was in the habit of visiting at their house. Mrs. Deane's quitting their house, she says, took them quite by surprise; she went out for an airing and never came back. "The first I knew

about where she was gone to was from Mr. T. himself, who came the same afternoon and communicated to me the fact of her having betaken herself to his house with the intention of remaining: he seemed, I must say, quite as much surprised at the step so taken by Mrs. Deane as we were." So here is this lady taking up her residence with a lieutenant of dragoons, at his hut; and Mrs. B. goes on to say, "I used to see Mr. T. passing backwards and forwards to and from his house during the next fortnight following Mrs. Deane's so leaving our house; so that, assuming the fact that she was also living there then, of which, I believe, there was no doubt (for her servant, I know, had to take her things there, left at our house), I could not but believe that she and Mr. T. were carrying on improper connection." Then there is a letter from Mrs. Deane, which Mrs. B. received on the same afternoon she had left their house, in answer to one addressed to her by the witness, urging her to return, which shews that she did not leave Mrs. B.'s house owing to any quarrel. Lieut. B. speaks to the same facts, but he does not draw the same conclusion. There is, however, the evidence of Mr. M., who says, in consequence of a communication made to him, as the friend of Mr. Deane, by Lieut. B., and in that character, he called at Mr. T.'s house (which, he says, was little better than a hut), and had an interview there with Mrs. Deane, and he called and had a second interview with her there about a fortnight after. "At these times," he says, "I did not actually see her in company with Mr. T. in the house, though on the first occasion I met and spoke with him just outside; but Mrs. Deane was avowedly living and cohabiting there with him; she made no concealment of it to me; indeed, at our first interview at the house, she expressed to me her determination to continue to do so." Then there is the letter of Mrs. Deane to her husband, which, coupled with the evidence of Mr. M., leaves no doubt whatever of her adultery.

Harding, Dr., on the same side, cited *Grant v. Grant*.*

Burnaby, Dr., for the wife.—There is not sufficient evi-

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* 2 Curt, 16. 7 Mo. Law Mag. 120.

DEC. 15. dence either of the alleged adultery, or of the identity of the party. The only witnesses to the transaction at Mussoorie (of the other charges there is no attempt at proof) are Lieut. and Mrs. B. and Mr. M., and neither speaks to any fact of adultery, or any undue familiarity. On the contrary, Mr. and Mrs. B. depose that they never witnessed any undue familiarity between Mrs. Deane and Lieut. T., or any thing calculated to create a suspicion that there was any criminality between them. Whatever presumption may arise from Mrs. Deane's quitting the house of Lieut. B., whether from caprice or any other motive, and going to that of Lieut. T. (who was an intimate friend of Lieut. B., and in the habit of visiting at his house), is rebutted by the evidence of Lieut. B., who says, "I did not at any time witness any indecent or undue familiarity pass between them;" and further, "I saw her at the house of Mr. T. while she was there, after leaving us. How long she remained there I do not now recollect. It was not so long, I believe, as a fortnight; it was not more than five or six days, I believe, speaking to the best of my recollection. That she did openly take up her abode in Mr. T.'s house during the period referred to (whatever it was) I know, for, as just stated, I saw her there; and that she did so with the intention of placing herself under the protection of Mr. T. I cannot, of course, entertain a doubt, though she did not communicate with me on the subject, her quitting our house having been quite unexpected to us; but further than that I cannot depose. I do not know that Mrs. Deane lived and cohabited with Mr. T. while at his house, or that he actually resided there with her during any part of the time that she was there. I did not see him at the house while she was there, nor do I know that he was at the house to stop during any part of the time. I know that, on learning that Mrs. Deane had betaken herself to his house, he was very anxious for her withdrawing herself, and though I believe him to have had interviews with her whilst she was there, I do not know that it was with any other object than to induce her to leave, and to get rid of the scandal of her being there. I do not positively know the fact, but my belief certainly is, that he

was absent from his house at the time she so betook herself there, and that he did not stop in the house to remain residing there (to sleep, or even take a meal there, I mean), but that he resolutely and purposely abstained from so doing so long as she remained." Mr. T., therefore, repudiated the advances of this lady, if she made any. The evidence of her identity is insufficient. No witness has been examined, who knew her in the character of the wife of Mr. Deane, to prove her identity. The letters might be written by an artful person by way of collusion; and there has been no verdict.

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R. Phillimore, Dr., on the same side, cited *Williams v. Williams*.*

DR. LUSHINGTON.—This is a suit by Mr. Deane, a gentleman residing in India, in the service of the East-India Company, against his wife, who is charged with the commission of adultery. The parties were married on the 17th January, 1840, and cohabited in various parts of Hindustan. Two children were the issue of the marriage, one of whom being in extremely ill-health, it was arranged that Mrs. Deane should, with the children, take up her residence with Mr. and Mrs. B. (Mrs. B. being a relative of Mrs. Deane), at Mussoorie, in the hills, Mr. Deane being obliged by his official duties to remain at Mozuffernuggur. Accordingly, Mrs. Deane proceeded to the hills with her children, and occupied the same house as Mr. and Mrs. B.; and some time after her arrival, one of the children died. According to Mrs. B., about a week after the death of the child, Mrs. Deane quitted their house, and went to the house of Mr. T., in the immediate vicinity. This gentleman was a cornet in the same regiment in which Mr. B. was a lieutenant; he was on very intimate terms with Mr. B., and frequently visited at his house; but, according to the evidence of both Mr. and Mrs. B., there was no indication whatever of any undue familiarity between the parties at their house, nor any circumstance which could lead to

* 1 Hagg. C. R. 299.

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any dispute between them and Mrs. Deane, or give them reason to expect that Mrs. Deane would quit their home and take up her residence at the house of Mr. T. But however that may be, I must look at the facts which appear in evidence before me, and afterwards consider what is the effect of those facts, and what is the true conclusion to be deduced from them; I must not be governed in my judgment by the mere opinions of witnesses.

What are the facts? Why, that this lady, being a married woman, quitted the house of Mr. and Mrs. B., with whom and under whose protection she resided, to go to the house of a cornet of a light dragoon regiment, and there continued for the space of a fortnight. Now it is argued by the learned Counsel on behalf of some one or other (they do not identify any particular party), that Mr. T. repudiated her advances, and that whatever was the purpose for which she went to him, there is no direct evidence to shew that they resided together in the house. Let us see how this fact stands in the evidence.

The evidence.

In the first place, the evidence of Mr. B. does not disprove the fact that Cornet T. did constantly reside in the house. It is impossible he could disprove it, unless he constantly resided in the house himself, or was constantly in the company of Mr. T. Mrs. B. deposes to seeing Mr. T. "passing backwards and forwards to and from his house during the fortnight following Mrs. Deane's leaving her house." The fact, however, is, that she continued for the space of a fortnight together, more or less, resident in the house of Mr. T.

The evidence of Mr. M. is, that he visited this lady on two occasions at that house, and that he visited her there as the friend of Mr. Deane, her husband, for a purpose best disclosed by resorting to his own testimony. Mr. M. was an intimate friend of Mr. Deane, and was then resident at Mussoorie, and it appears that, from some communication made to him (the precise nature of which is not developed to the Court), he was led to visit this lady whilst she was residing in the house of Mr. T.; and these are the words of Mr. M.: "I had not had the opportunity of witnessing the

intercourse between Mrs. Deane and Mr. T. while she was residing with Mr. and Mrs. B. I saw her twice afterwards at the house of Mr. T. ; it was little better than a hut. The first time I saw her there was about the end of June, or beginning of July. She had, I believe, left the house of Mr. and Mrs. B. only the evening before. I went to the house of Mr. T. on that occasion in consequence of the communication then made to me, as the friend of Mr. Deane, by Mr. B., and in that character I called at Mr. T.'s house, and had an interview there with Mrs. Deane. I called and had a second interview with her there one day about a fortnight afterwards. At these times, I did not actually see her in company with Mr. T. in the house, though on the first occasion I met and spoke with him just outside; but Mrs. Deane was avowedly living and cohabiting there with him. She made no concealment of it to me; indeed, at our first interview at the house, she expressed to me her determination to continue to do so." The true import of this evidence is, that she acknowledged that she was living and cohabiting with Mr. T., and declared she would continue so to do. What other construction could the Court put upon this evidence, consistent with common sense and with the *res gestæ* and facts in the cause, than that this lady was guilty of adultery with Mr. T. ? Here is a young woman, leaving the protection of her relations, and resorting to a cornet of dragoons living by himself ! Why, if the Court could be induced to consider that this was not proof of adultery, it must require in every case evidence of adultery actually committed at some particular time and place, and there would be an utter impossibility of establishing a fact so often kept by the parties in absolute darkness.

Then what follows ? This lady does not return to the house of Mr. and Mrs. B. ; after quitting Mr. T., she goes to the house of Mr. and Mrs. C., who, according to the evidence, were persuaded to take her under their care, that is, to take her under their protection as a disgraced woman.

If this testimony is not sufficient, what shall we say to the letters ? The first is addressed to Mrs. B., and I cannot conceive that any other meaning can be affixed to it than

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DEC. 15. that contended for by the Counsel for Mr. Deane. "I feel
Deane v. Deane. all your kindness, and am most truly grateful to you for it; but to come back is impossible." Why, if there had been no act of adultery; if Mr. T. had never entered the house, and had repelled the advances of this lady, what difficulty could there be in throwing herself upon the friendship of Mrs. B., and saying, "Although I may be, to a certain extent, a disgraced woman, I am not a guilty one; I can appeal to Mr. T. himself?" The letter continues: "My little Harry, I know, you will take charge of and be kind to, till I can hear from his father what he wishes to be done with him." What is this but saying "I have so conducted myself that I am not fit to have the care of my own child?" It goes on: "Do not distress yourself on my account; I could never be happy if I returned." Why not? This letter I do not hold to be a direct admission of guilt; but it is, to a certain extent, an admission of facts consistent with guilt and not with innocence.

The other letter is addressed to her husband: "I think of all your love, your invariable kindness to me, and the base, the horrible return that I have made to you, till I am almost mad." What is the "base and horrible return" she had made for the love and kindness of her husband? I think nothing but the violation of her marriage-vow could have induced this lady to use expressions so extremely derogatory to herself. If it had not been guilt, but only imprudence, she would have used different expressions: "Henry, dear Henry (for notwithstanding all my ingratitude, I do still most dearly love you), can you, will you forgive me? I would do any thing for that, for one kind word from you. I requested Mr. D. to write to you for me, but I cannot wait so long, knowing how you must hate and reproach me. Let me come to your house again, if only as a servant to take care of your child." Does an innocent wife write so? "Tell me what to do, and do not utterly cast me from you, Henry; you could not do so did you know my deep, deep remorse and repentance." I do not know how to understand these words except as a direct admission of guilt, which fully corroborates all the oral

testimony and the conclusions of Mr. M. He was on the spot ; he went to remonstrate with her, and to induce her to leave the house of Mr. T. ; but she persisted in her determination to live and cohabit with him.

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Now the Court does not entertain any doubt as to the sufficiency of the proof of adultery ; and *à fortiori*, for if there is no foundation for the charge, it is manifest that the party proceeded against in this case had an opportunity of pleading and of rebutting the presumption and the circumstances of suspicion against her, if she could do so with any possible chance of success.

With respect to the identity of the party, there was not a doubt raised until that question was argued by the learned Counsel, who have contended that there is no proof of the party proceeded against being the real party who committed the adultery. What are the facts? A lady is served with a Citation on the part of Mr. Deane, and she appears, by a Proctor, in the character of Mrs. Deane, the wife of Mr. Deane ; and the Proctor, appearing on behalf of the lady so cited, retains learned Counsel for his party, who argues for the lady so cited, and it is suggested to the Court that their client may be a totally different person from Mrs. Deane, who may not have the slightest means of knowing that there is such a suit against her at all. Whether the identity of the party is established depends upon the whole circumstances of the case. Now what are the circumstances of this case? It is true there is a great *hiatus* in the evidence as to where this lady resided when she left the C.'s, and how she came here. It is true that Mr. Deane, the father of the husband, did not know her when she came to him in this country, not having seen her before, and he had no means (in the strict sense of the word) of knowing who the lady was when she paid him a visit. But if it was not Mrs. Deane who made her appearance on that occasion, who in the world was it who appeared to Mr. Deane, senior, and represented herself as Mrs. Deane, and not only appeared to him, but endeavoured to pass as Mrs. Deane, and was served with a Citation as Mrs. Deane, and has appeared in that character in this Court? It is said that all this may be col-

The identity
of the party.

the real party in the cause. I confess, I can ent
Adultery and I hold the adultery to be satisfactorily proved
identity proved. there is nothing to induce the Court to believe a
party in the cause is not the party who has appealed
Proctor.

(Separation pronounced for.)

Proctors:—*Wadson*, for the husband; *Glenzie*, for the

END OF MICHAELMAS TERM, AND OF
SITTINGS AFTER TERM.

Admission during the Term:—

AS ADVOCATE.

Nov. 2.—*FETHERSTON STONESTREET, Esq., D. C. L.*, of
College, Cambridge.

SUPPLEMENT.

High Court of Admiralty.

MAY 26, 1847.

THE "TRITONIA."—*Cause, by Act on Petition.*—This was an action by the master, owners, and crew of the yawl *Robert and Mary*, against the schooner *Tritonia*, of sixty-five tons, her cargo and freight, in a cause of salvage. Salvage.—De-
relict.—Wreck
and Salvage
Act.

The Act on Petition alleged that, on the 19th December, 1846, the parties, fishermen and mariners living at Sherringham, Norfolk, being informed that a ship's crew had abandoned their vessel, launched their yawl, and, nineteen having got into her, rowed her (the wind blowing heavy from the W.N.W.), and at half-past five A.M. discovered the vessel lying upon her larboard side on Blakeney Outer Bank, striking heavily, the sea breaking completely over her fore and aft; that one of the party, at considerable risk, succeeded in getting on board, when he found the vessel, laden with railway iron, had been abandoned; that, others of the party having got on board, they took measures to get her off the sand, but, the tide beginning to ebb, she stuck fast, and two of their number went on shore, and reported the vessel to Mr. Brereton, at Blakeney (the agent to whom the vessel had been consigned); that those on board the schooner found three feet of water in the hold, and, both the pumps being useless, they commenced baling the water out with buckets; that a man sent by Mr. Brereton ordered the cargo to be discharged, and employed some of the townspeople to remove the iron; that the parties, having baled all the water out, and heaved upon the anchors, when the water ebbed, found she would not start; that at six A.M. they succeeded in moving the schooner a few yards, but on the ebbing of the tide she again lay fast; that, as the water flowed, they again began to heave at the chains, and just before high water the schooner swung, and they got her into deeper water, and warped her towards the harbour, but at ten P.M. she took the ground again; that at five o'clock of the following morning she floated, when they warped her to the harbour-buoys, whence she was towed by a steam-tug inside the harbour; and they expressly alleged that,

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had it not been for their exertions for seventy-two hours, the vessel would have gone to pieces, and been totally lost.

The Answer of the owners alleged that the schooner sailed from Cardiff, bound for Wells, consigned to Messrs. Brereton, of Blakeney (about six miles from Wells); that on the 18th of December, when off the harbour of Blakeney, she got on shore, and finding the vessel was labouring heavily on the sand, and the sea breaking over her, the master and crew (four hands) took to their boat, and proceeded to Waybourne; that, during the night, the vessel floated off with the tide, and was carried towards the mouth of Blakeney harbour, and grounded on the east bar; the following morning (the 19th), information having been brought to Blakeney of the vessel being on the bar, and the wind blowing fresh from the S.W., Captains Starling and Dew were immediately sent down by Messrs. Brereton, the consignees of the cargo, to take the necessary measures for getting her off, who found her lying perfectly upright, and having boarded her, found the Sherringham men on board, but as they were incapable of getting the vessel off, Capt. Starling set to work twenty other fishermen, from Blakeney, when all the fishermen commenced taking out the iron, and getting out the anchors, to heave the schooner off when the tide flowed; that, at half-past five P.M., a steam-boat went down to the schooner, and endeavoured to pull her off the sand, until the tide began to ebb, when, the schooner still remaining fast, the steam-boat returned to the harbour, and the Blakeney men went on shore; that, about ten o'clock P.M., the tide having sufficiently ebbed, fifty-eight men proceeded to the schooner, and set to work, with the Sherringham men, in further lightening her, and at seven A.M. the steam-boat again came and tugged at her, but with little effect, and on the ebbing of the tide she returned; that the master and crew of the schooner, who had arrived at Blakeney on the 19th, had been aboard all the 20th; that at six o'clock A.M. of the 21st, several of the Blakeney men went to board the schooner, but were prevented by the Sherringham men, and that at seven A.M. the steam-boat again proceeded to the schooner, which had come off on the flowing of the tide, and towed her into the harbour; that, on the afternoon of the 22nd, whilst the schooner was lying at the quay, with her remaining cargo, under the care of the consignees, and her master being then in possession of her, Mr. Samuel Palmer, of Great Yarmouth, Deputy Receiver of Droits, accompanied by Mr. W. T. Clarke, a Notary Public, arrived at Blakeney, and, by threats of certain penalties under the Act 9 & 10 Vict. c. 99, compelled the master to make an affidavit as to his having abandoned the vessel on the 18th December, and on obtaining

such affidavit, forcibly seized and took the schooner with her cargo out of the possession of the master, without any lawful warrant from any magistrate, as having been derelict; that the owners, being unable otherwise to recover possession of the vessel and cargo, have been compelled to pay to Mr. Palmer £76. 15s. 6d., to procure their release; that the principal salvors were the Blakeney fishermen and the steam-boat; that the Sherringham fishermen had neither the means nor power of themselves to have got her off, or landed her cargo, and that they were induced solely at the instance of Mr. Clarke, without ever applying for any compensation to the owners, then and there on the spot, to permit him to send off for an Admiralty Warrant; and to institute this suit, which he did; that the Blakeney fishermen, fifty-eight in number, have received £150 for their services, and her owners have agreed to receive £50 for the services of the steam-boat; and it concluded with a prayer that the tender of £100 might be pronounced sufficient.

The Reply of the parties proceeding denied, *inter alia*, that they were of themselves incapable of getting the schooner off, on the contrary, they were fully competent to have performed the service by their own undivided exertions; they denied that they were induced solely at the instance of Mr. Clarke to permit him then and there to send off for an Admiralty Warrant, or that the proceedings in this cause were commenced on their behalf without any previous application to the owners; Mr. Clarke having been induced to act in this cause as the agent of the parties proceeding solely and entirely at their request, and, previous to the arrest of the vessel, application was made, with respect to the salvage, by Mr. Clarke, to the master and part-owner, who replied that he had nothing to do with it, having abandoned the vessel and her cargo; and the parties, protesting against any of the proceedings of Mr. Palmer forming part of the present suit, positively denied that he held out any threats whatever to induce the master to make an affidavit as to the abandonment of his vessel, the affidavit having been made quite voluntarily by the master.

The Rejoinder, *inter alia*, again positively denied that any application whatever of the nature of that mentioned in the Reply was made prior to the commencement of the suit by Mr. Clarke, as agent of the salvors, either to the master or to the consignees, nor did the master say that he had abandoned the vessel and her cargo, and would have nothing to do with her, or any thing to that effect.

A Motion for an attachment against Mr. Palmer was re- Jan. 13
fused by the Court.*

* *Ante*, p. 110.

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Trilasia,
JUDGMENT.

Dr. Robinson and James D. Duty, for the salvors, petitioned
Twiss, Dra., for the owners of the vessel *Trilasia*, to be ordered
to pay to the salvors the sum of \$1000, as compensation for the
services rendered by them in saving the vessel and cargo.
Dr. Lushington. I am not disposed upon this, new
trust, upon any other occasion, to extend the law, which
is my strict duty, namely, to consider the points which are
fit and proper for me to decide; and not to take into con-
sideration other circumstances which do not properly belong
to the jurisdiction which I exercise. By the rule of equity,
which I have to determine, whether the amount of \$1000,
which has been tendered to the salvors, is sufficient to
induce them to relinquish their claim, or is not a sufficient remuneration for the services they
have rendered to this ship and cargo. And as it is admitted
in the first place, it is admitted, and indeed it is impos-
sible of denial, that the vessel was derelict, a very important
consideration in all these cases, because, when once a vessel
has been abandoned by her master and crew, it is necessary
of real danger, for the purpose of saving their lives, and
whatever persons first gain possession of it, have a right, and are
competent to render, salvage services, and are entitled to retain
possession of her, until she be either voluntarily given up,
or they are divested by due course of law. It is a well-
known rule, that in such cases, whether the case be of a
derelict, or of simple salvage, the expediency of not standing
by their strict rights, but to deliver her up as is deemed
best, for the convenience and advantage of the owners of the
ship and cargo, the property of which they are in charge,
provided, always that these salvors, in the first instance, give
adequate security for that reward to which they may be
found ultimately entitled.

The facts.

It appears that this vessel, being one of small burthen,
laden with a heavy cargo of iron, proceeding from Cardiff
to Wells, consigned to Messrs. Bagston, was abandoned by
her master and crew on the evening of the 18th December,
and I see no reason to suppose that the abandonment took
place without just and sufficient cause. I recollect
that, it occurred upon a coast, quite new to many of the
vessel's navigating it at that season of the year; and, notwith-
standing, the representations on all hands, the weather was

SUPPLEMENT.

v

baister out and in, and so on. Although the vessel was abandoned on the point of Blakeney harbour, the master and crew did not land at Blakeney, but more to the eastward, from whence, by the coast-guard at Sherringham, still more to the eastward, tidings were conveyed of this vessel having been left derelict. (The Sherringham boatmen, to the number of nineteen (it was stated in the argument that the vessel is the property of many others), launched at night a yawl, and proceeded to row (because the state of the wind rendered it impracticable to sail) towards the place where they expected to find the derelict. They found her near the point of Blakeney harbour, in a situation described by the master himself as one of extreme peril, and subsequently conceived by him to be one of so great peril, that he carried away the ship's stores and sails (she having, according to his Protest, five feet of water at that time in the hold); and, having so found her, they proceeded to render such services as, under the existing circumstances, they could render.

A question has arisen here, whether, if they had been totally unassisted by any other persons, they alone would have been competent to have rescued the vessel and the whole of her cargo. That is a theoretical question, into which I do not think it necessary to enter. I doubt whether I have materials whereon to form a judgment upon it, and I think it would be wholly useless to attempt to do it. I shall look to the services actually performed, rather than to those which might by possibility have been required.

These men proceeded to bale out the water, the pumps being broken, and to take those steps which were immediately necessary to save the vessel; but they found it expedient, and very properly allowed other persons to unite in that service, when they were sent under the authority of the consignees of the cargo. I do not know that they were to blame in refusing to allow the persons from the billy-boat to come on board. I know of no law, nor of any principle, which would not justify them in saying to these persons, 'We do not want you on board.' The principle has been laid down in this Court, over and over again, that the original salvor, who got possession of a vessel, more especially a

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Tytonia.

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Tritonia.

derelict, — are entitled to exclude others, provided the service be completely performed. They did not exclude the persons whose assistance was necessary; they adopted the act of the owners, for they allowed fifty-eight Blakeney men to operate with them in landing the cargo, and perhaps I might say, in taking other measures, with regard to other anchors, necessary for the safety of the vessel. However that may be, the merit of the services of these individuals is not at all; the length of time occupied is not at all; the danger of losing the cargo, at the time they commenced the operation, is not at all. I think it an ingredient of merit, not of blame, that they did allow other salvors, namely, the Blakeney men, for which they have been blamed, to assist in performing the service. Whether or not the steamer might have sailed out a little sooner or a little later, whether, in consequence of the omission of coming out at the precise time she was sent for, she missed a tide, are really questions on which I have not sufficient means of forming an opinion; and I consider it necessary to discuss all the little points that have been agitated in the papers, though I think highly omitted by the Counsel on both sides. The service was performed, the vessel was lightened, a sufficient quantity of the cargo was landed, and the remainder (forty-five tons) was brought in safety into the port of Blakeney. 11th June 1861.

Proceedings
of the Receiver
of Droits.

These are all the facts on which my judgment must depend. I consider all the rest of the statements to be utterly irrelevant to this question. I have nothing to do with the conduct of Mr. Palmer; I have nothing to do with a Receiver of Droits appointed under the authority of an Act of Parliament. Whether he has demanded what is just or unjust, is not for this Court to determine. As to whether he was authorized to take possession of this vessel or not, I will give no opinion. I said, on a former occasion, and I did not expect to be called upon so unnecessarily to repeat that opinion, that, if complaints were to be made, they must be made to a tribunal competent to consider and decide the case, and not to me, who have no authority to give an opinion, or means of determining the question. Therefore, I lay that matter out of the question, and I also

lay out of the question the attempt made, on the present occasion, to apologize for the introduction of this irrelevant matter; namely, that a petty sum of £76 ought to be deducted from the whole value of the property, supposing Mr. Palmer was justified in his demand. I think I am entitled and bound to consider these persons as entitled to salvage out of the whole value of the property, without the slightest regard to any thing done by Mr. Palmer or any one else. With regard to the arrest of the vessel, Mr. Clarke was employed by the salvors as their agent. He is a gentleman residing at Yarmouth, and in his affidavit he states that he received no letter from Sheeringham, not from Blakeney, stating that the company there had taken a derelict vessel into Blakeney, (it being notorious that, all along that coast, the vessels are owned by companies, who unite to render salvage services at a common expense, on some system which it is not necessary for the Court to know or inquire into), and requesting that he would immediately go over to Blakeney, which he prepared to do, and, having accidentally fallen in with Mr. Palmer, in the morning, they went together. Now, I disassociate Mr. Clarke from Mr. Palmer, for I know no reason why Mr. Clarke is to be disbelieved in his affidavit as to matters of fact of this kind; and I know no reason why, because Mr. Clarke thought proper to travel with Mr. Palmer, therefore he is to be mixed up with Mr. Palmer in those transactions in which Mr. Palmer was engaged, in his capacity of Receiver of Droits. The only question I have to consider is, whether Mr. Clarke, as agent for the salvors, was justified in arresting this vessel. He states two reasons; one, that the master said he had nothing to do with the salvage; that he had abandoned the vessel and cargo, and had nothing more to do with it. I know this is denied, and that it is a contested fact in the case; and it would be very difficult to judge from the affidavits which party is entitled to the greatest credence. Another reason,—by no means a satisfactory one,—is, because, on a previous occasion, this gentleman states that he had been treated in an ungentlemanlike and uncourteous manner by Mr. Brereton, and therefore he thought it proper to resort to the process of

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T. Lewis.

And of the
salvors' agent.

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MAY 28.
Tritonia.

arresting the vessel. So far as he was actuated by that motive, the Court cannot exonerate him from blame. He has no right to import into the case any previous quarrel. But the question is, Was he justified in arresting this vessel? I apprehend every salvor is entitled, as a matter of right, to come to this Court if he thinks fit; that he is not compelled to enter into a negotiation with the owners of the ship and cargo. It may be beneficial to himself and the owners that he should do so; but, as a matter of right, especially in a case of derelict, the salvors are entitled to resort here to enforce their demands; in other words, the law entitles them to say, "We will have the judgment of the High Court of Admiralty, as to the extent of remuneration which we ought to receive, and we will not negotiate."

It has been said that £50 was given to the steamer, and £150 to the fifty-eight Blakeney men, and that this is a criterion of the value of the services rendered by these salvors. Now I doubt that very much; and I also doubt whether my mind ought to be affected in the slightest degree by the conduct of these other parties. I do not know why the sum of £50 was given to the steamer, which was the property of Mr. Randle Brereton and others. I do not know on what principle the Blakeney men estimated their services; but this I know, that they do not stand on the same footing as the Sherringham men, as the latter first boarded the vessel when abandoned, which gives them a title superior to that of the Blakeney men, in every sense of the word.

The sum tendered increased.

Costs.

Then the simple question is, whether £100 is a sufficient remuneration for their services, and I am clearly of opinion that it is not; and looking at the danger of the coast, the season of the year, the peril of the vessel, and, above all, remembering that this was a derelict, I am of opinion that I shall not give one sixpence too much in allotting an additional £100. Of course, the costs must follow, and if they fall heavily upon the owners, they have to blame themselves for introducing this mass of matter, which is wholly irrelevant, with regard to Mr. Palmer and Mr. Clarke.

Proctors:—*Jenner*, for the salvors; *F. Clarkson*, for the owners.

innative the Court cannot exonerate him from blame. He arrested the vessel. So far as he was actuated by that

Confirmation of the Election of Bishops.

to come to this Court if he thinks fit; that he is not com-

The Reverend James Baxter Lee, Lord Bishop of Montreal, presided. The ceremony of reconfirming

the election of the Reverend James Pinckney Lee, M.A., to the Bishopric of the Anglo-Catholic Diocese of Manchester, took place.

and St. James's Church, Piccadilly, by Commissioners authorized for that purpose by a Commission from His Grace the

Lords Archbishop of York or such election having been made, in virtue of a License of George 4th King and Letters Missive

from Her Majesty, by the Dean and Chapter of Manchester,
and having been signified by Letters Patent under the Great

The Communists pretend (namely, Dr. Burnaby, Vicar

General, of the Lord Archbishop, of Canterbury, and Sir John Dodson, Master, of the Faculties), the Lord, elected Bishop,

the Proctor, for the Dean and Chapter, and the proper officers, assembled in the vestry of the church, to receive

The Precentor for the Dean and Chapter addressed his

Lordship as follows: And May it please your Lordship, I
 exhibit my Proxy for the Rev. the Dean and Chapter of

the Cathedral Church of Manchester, and present to your Lordship a certificate of your being elected to be Bishop

and Pastor of the said ten; and pray and once and again earnestly request and entreat that your Lordship will be

The Lord Bishop elect having read the schedule of con-

sent, and affixed thereto his signature, "J. P. Manchester, (Elect)" the Commissaries and other officers, with the

The Litany having been read by the Rector of the

parish, the Commissioners took their seats at a table in the body of the church; the Bishop elect remaining in his

pew.
VOL. V. b

74-1
JIS 84 M
—
DISOIT

Confirmation of the election of the Bishop of Manchester.

1. *Hydrolysis of the ester*
 2. *Hydrolysis of the ester*
 3. *Hydrolysis of the ester*

— 22 —

100

1848.

JAN. 8.

*Confirmation
of Bishops.—
Manchester.*

Instruments
authorizing the
confirmation.

The Registrar of the Vicar-General of the Archbishop of Canterbury read, first, a License from His Grace, permitting the Lord Archbishop of York to confirm the election and to consecrate the Lord elected Bishop anywhere within the province of Canterbury ; secondly, the Commission from the Lord Archbishop of York, setting forth that, having received Letters Patent from the Queen requiring and commanding him to confirm the election of the Reverend James Prince Lee, clerk, M.A., to be Bishop and Pastor of the see of Manchester, he had given power and authority to Granville Harcourt Vernon, Esq. (his Vicar-General), Sherrard Beaumont Burnaby, Doctor of Laws (Vicar-General of the Archbishop of Canterbury), the Right Honourable Sir Herbert Jenner Fust, Knight, Doctor of Laws (Official Principal of the Arches Court of Canterbury), the Right Honourable Stephen Lushington, Doctor of Laws (Chancellor of the Diocese of London), and Sir John Dodson, Knight, Doctor of Laws (Master of the Faculties), or any or either of them, to confirm the said election.

*Litteræ Pa-
tentes Regiæ.*

The Proctor for the Dean and Chapter.—Right worshipful,—I exhibit my Proxy for the Dean and Chapter of the Cathedral Church of Manchester, and make myself a party for them, and do present unto you the Letters Patent of our Sovereign Lady the Queen, issued under the Great Seal of Great Britain, for the confirmation of the election of the Reverend James Prince Lee to be Bishop and Pastor of the said Cathedral Church of Manchester, and do pray that the same may be read.

DR. BURNABY (FIRST COMMISSARY).—Let the Letters Patent be read.

(The Letters Patent were then read by the Registrar.)

Prayer for
Confirmation.

Proctor.—I humbly pray that you will be pleased to take upon you the duty of the said confirmation, and to decree that it be proceeded in according to the form of the said Letters Patent, and the exigency of the law.

DR. BURNABY.—In obedience to the command of our Sovereign Lady the Queen, we do take upon us the duty of the confirmation of the said election, and do decree that it be proceeded in, according to the force, form, and effect

of the said Letters Patent, in the presence of Francis Hart Dyke, Notary Public, Principal Registrar of the Province of Canterbury.

1848.
JAN. 8.

(The Bishop elect now took his seat at the Table, opposite to the Commissaries.)

*Confirmation
of Bishops.—
Manchester.*

Proctor.—I present unto you the Reverend James Prince Lee, elected Bishop and Pastor of the Cathedral Church of Manchester, aforesaid, and do here judicially produce his Lordship, and, as Proctor for the said Dean and Chapter, do exhibit an original Mandate, together with a certificate thereupon indorsed, touching the execution of the said Mandate, against all and singular opposers, and do pray they may be publicly called.

*Presentation
of the Bishop
elect.*

DR. BURNABY.—Let the opposers be publicly called.

*Citatio con-
tra oppositores.*

Preconization was made by the Apparitor as follows :—

“ All manner of persons, who shall or will object to the confirmation of the election of the Reverend James Prince Lee to be Bishop of the episcopal see of Manchester, are now to come forward and make their objections in due form of law, and they shall be heard.”

Mr. Thomas Gutteridge (who was standing in the aisle).— I am an opposer, and object to these proceedings.

*Appearance
of an opposer.*

SIR JOHN DODSON.—What is your name?

Mr. Gutteridge.—Thomas Gutteridge.

SIR J. DODSON.—Where is your residence?

Mr. Gutteridge.—I live in Cannon Street, Birmingham.

SIR J. DODSON.—What is your profession?

Mr. Gutteridge.—I am a surgeon.

SIR J. DODSON.—Do you mean to object to the confirmation of the Lord elected Bishop of Manchester?

Mr. Gutteridge.—I do.

SIR J. DODSON.—Have you your objections drawn up in what purports to be due form of law?

Mr. Gutteridge.—Yes.

SIR J. DODSON.—Let me see them.

Mr. Gutteridge.—The first is a Protest against the proceedings of this day: “ I, Thomas Gutteridge, a member of the United Church of England and Ireland, do protest against the proceedings of this day, for the confirmation of

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the Rev. James Prince Lee, Bishop elect of Manchester, on the ground that it is unlawful to proceed to such confirmation elsewhere than in the province of York, and also on the ground that due and sufficient notice and publicity have not been given of such intended confirmation."

SIR J. DODSON.—The Protest cannot be entertained.

Mr. Gutteridge.—I have also Articles to present.

SIR J. DODSON.—By whom are they signed?

Mr. Gutteridge.—By myself, "Thomas Gutteridge."

JUDGMENT.

SIR J. DODSON.—We feel it to be our duty not to permit you to appear and oppose the confirmation of the Lord elected Bishop of Manchester. We sit here as Commissioners of his Grace the Lord Archbishop of York, for the express purpose of confirming the election made by the Dean and Chapter of Manchester, and we consider that we are bound by law to proceed to the confirmation without committing or suffering any let or hindrance thereto. The Statute 25 Henry 8, c. 20, is imperative upon this matter; it leaves no choice. By the 5th section of that Statute, the Archbishop, upon the election being signified to him in Letters Patent from the Crown, is required and commanded to confirm the election, and to invest and consecrate the person elected. By the 7th section of the same Statute it is enacted, that "if the Archbishop, after such election shall be signified to him by Letters Patent from the Crown, shall refuse and do not confirm, invest, and consecrate with all due circumstance the person so elected and signified within twenty days next after such signification shall come to his hand, or if the Archbishop or any other person admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act, of what nature, name, or quality soever it be, to the contrary or let of due execution of this Act, then the Archbishop and all other persons so offending and doing contrary to this Act, or any part thereof, and their aiders, counsellors, and abettors, shall run into the dangers, pains, and penalties of the Statutes of Provision and *Præmunire* made in the 25th year of Edward 3, and in the 16th of

Richard 2." We are not disposed to run into those dangers, pains, and penalties, and we are resolved, neither ourselves to do, nor to allow, so far as we can prevent it, any act to be done by another, which may be to the let or hindrance of the confirmation of the Lord elected Bishop of Manchester, or which may in any way contravene the provisions of the Statute; especially as you have produced no objection in due form of law. Upon the ground which I have stated,—the imperative nature of the Statute,—we do refuse to hear you further in objection to the confirmation of the Lord elected Bishop of Manchester.

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Mr. Gutteridge.—Believing that I am acting in obedience to the law, I do also present to you on this occasion another instrument, which is a Libel, and is intended to apply to this case, with a view also to stop these proceedings. I hand these documents to you now. Libel tendered.

SIR J. DODSON.—We cannot receive them.

Rejected.

Mr. Gutteridge.—I place them on this table; I present them to you, and I solemnly protest against these proceedings.

DR. BURNABY.—There can be no protest against this course of proceeding.

Proctor.—I accuse the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and, in pain of such their contumacy, pray that they and every of them be precluded from the means of further opposing against the said election, the manner thereof, or the person elected, in this behalf, and also that it be decreed to be proceeded to further acts in this business of confirmation, the absence or contumacy of the persons so cited, intimated, publicly called, and not appearing, in anywise notwithstanding; and I porrect a Schedule, which I pray to be read. Opposers accused of contumacy.

DR. BURNABY read the First Schedule, which was as follows:— *Schedula Prima. — Opposers pronounced contumacious.*

"We, &c., two of the Commissaries named in the Commission, &c., being hereunto lawfully authorized, proceeding regularly and lawfully in the said business of confirming the election had and celebrated of the person of the Reve-

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rend James Prince Lee, Clerk, M.A., elected Bishop and Pastor of the Cathedral Church of Manchester, do, at the prayer of the Proctor for the Dean and Chapter of the Cathedral Church of Manchester, pronounce contumacious all and every opposers (if any such there be) that shall say against, except to, or oppose, the said election, the form of the same, or the person in this behalf elected, being lawfully and peremptorily cited and intimated to appear before us this day, hour, and place, if they should think it concerns them in due course of law to say against, except to, or oppose, the said election, the form thereof, or the person in this part elected, being sufficiently expected, and publicly preconized, and in nowise appearing, and, in pain of their said contempt, do preclude them and every of them from any way of further opposing the said election, the form thereof, or the person in this manner elected in these writings, and do decree that the said business of confirmation shall be further proceeded in according to the exigency of the laws and statutes of this kingdom, the absence or contumacy of them so cited, intimated, and not appearing in anywise notwithstanding."

(The Commissaries then signed the Schedule.)

Proctor.—In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, I give this Summary Petition, in writing, which I pray to be admitted, and that it be decreed to be proceeded summarily and plainly, and that a Term be assigned me to prove the same immediately.

*Summaria
Petitio.*

The Summary Petition (signed by Dr. Haggard and Dr. Twiss) alleged, 1. That the Episcopal See of Manchester, recently founded by an Act passed 10 and 11 Vict., was vacant, and destitute of the comfort of a Pastor. 2. That, the See being so vacant, the Dean and Chapter, being capitularly assembled, and making a Chapter, having first prayed for and obtained the Royal License, did in their Chapter House unanimously fix a certain day for the election of a Bishop, and all the Prebendaries or Canons having a vote were lawfully cited to proceed on that day to the election. 3. That the Dean and Chapter, on the day pre-

fixed, namely, the 17th November, 1847, being capitularly assembled, and making a chapter, and having first of all diligently considered of a person fit to be elected Bishop and Pastor of the Cathedral Church of Manchester, did at last unanimously elect the Reverend James Prince Lee to be their Bishop and Pastor. 4. That the said election and the person so elected were duly published and declared in the Cathedral Church before the clergy and people. 5. That the Reverend James Prince Lee, the Bishop so elected, at the humble petition of the Proctor of the Dean and Chapter, being requested and earnestly entreated, did consent to his election. 6. That the said Bishop Elect was and is a prudent and discreet man, and eminent for his knowledge of the Holy Scriptures, for his life and morals deservedly commended, of a free condition, and begotten in lawful wedlock, and of lawful age, and an ordained priest, and also devoted to God, and greatly useful and necessary to the aforementioned Church. 7. That the Dean and Chapter had, by their Letters Patent under their common seal, signified and intimated the said election and person elected to Her Majesty. 8. That Her Majesty had given her Royal assent to the election. 9. That the Queen had not only signified to the Archbishop of York concerning her Royal assent to such election by her Letters Patent under the Great Seal, but also by the tenour of the same had ordered that he would favourably and effectually confirm the election of the person so elected, and do, perform, and fulfil whatever else on this occasion is incumbent on his pastoral office, according to the form of the laws and Statutes of this realm published and provided. 11. The party proponent then prayed that the said election and person elected may be decreed to be confirmed; and that the care, government, and administration of the spirituals of the Bishopric be committed to the said Bishop elect, and that it be decreed that he be inducted, installed, and enthroned into the real, actual, and corporal possession of the said Bishopric, its rights, dignities, and appurtenances.

DR. BURNABY.—We do admit this your Summary Petition, so far as the same may by law be admitted; and do

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- decree that it be proceeded summarily and plainly ; and we do assign you a Term to prove this: your Summary Petition immediately.
- Proctor.*—In pain of the contumacy of all and singular persons cited, intimated, publicly called, and not appearing, and in supply of proof of the matters contained in my said Summary Petition, I exhibit a certificate, touching and concerning the election of the aforesaid Reverend James Prince Lee to be Bishop and Pastor of the Cathedral Church of Manchester, made by the said Dean and Chapter of the said church, and issued under their common seal ; I likewise exhibit a public instrument of the consent of the said Reverend Father to the said election, and her Majesty's Letters Patent before read, and I allege that all and singular the matters set forth in the said Exhibits respectively were and are true, and so had and done as therein contained ; and I pray all of them to be admitted, and that a Term be assigned me to hear Sentence instantly.
- Proofs in person.*
- Assignment to hear sentence.*
- DR. BURNABY.—In pain of the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing, we do admit these public instruments, and do assign to hear Sentence instantly.
- Proctor.*—I pray all and singular the said opposers to be again publicly called.
- Opposers again called.*
- DR. BURNABY.—Let the opposers be again publicly called.
- (A second preconization of opposers was then made.)
- Protest.*
- Mr. Gutteridge.*—I protest against these proceedings for confirming the Reverend James Prince Lee as Bishop of Manchester, for the reasons which are already placed before the Court.
- DR. BURNABY.*—We cannot entertain that Protest.
- Opposers again accused.*
- Proctor.*—I accuse the contumacy of all and singular the persons so as aforesaid cited, intimated, publicly called, and not appearing, and I pray them to be pronounced contumacious, and, in pain of such their contumacy, that it be decreed to be proceeded to the pronouncing your Definitive Sentence ; and I porrect a second Schedule, which I pray to be read.

DR. BURNABY read the Second Schedule, which was in the same form and to the same effect as the First Schedule, concluding, "In pain of such their contumacy, we decree to proceed to the pronouncing our Definitive Sentence or Final Decree to be published in this business, the absence or contumacy of the so cited, intimated, and not appearing, in any-wise notwithstanding."

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Schedula
Secunda.

(This Schedule was then signed by the Commissaries.)

Proctor.—The Lord Bishop elect is ready to take the *Juramenta*, oaths required in this behalf.

DR. BURNABY.—Let the oaths be taken.

The Lord Bishop elect, kneeling, took the oaths of Allegiance, of Supremacy, against Simony, and of Obedience to the Archbishop of York.

Proctor.—I porrect a Definitive Sentence in writing, *Sententia*, which I pray to be read and given.

DR. BURNABY read the Definitive Sentence, as follows:—
"In the name of God, Amen. We, &c., being hereunto lawfully authorized, and having heard, seen, understood, and discussed the merits and circumstances of a certain business of confirmation of an election made and celebrated of the person of the Reverend James Prince Lee, clerk, M.A., elected Bishop and Pastor of the cathedral church of Manchester, which is controverted and remains undetermined before us in judgment; and having considered the whole process had and done in the business of such confirmation, and having observed all and singular the matters and things that by law in this behalf ought to be observed,—we have thought fit, and do thus think fit, to proceed to the giving our Definitive Sentence or Final Decree in this business, in manner following:—Whereas by the acts enacted, deduced, alleged, propounded, exhibited, and proved before us, relating to such confirmation, we have amply found and do find that the said election was rightly and lawfully made and celebrated by the Dean and Chapter of the said cathedral church of Manchester, of the said Reverend the Bishop elect, a man both prudent and discreet, deservedly laudable for his life and conversation, of a free condition, born in lawful wedlock, of due age, and an

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ordained priest, and that there neither was nor is any thing in the ecclesiastical laws that ought to obstruct or hinder his being confirmed by our authority Bishop of the said see : Therefore we, &c., having weighed and considered the premises, and with the assistance of the learned in the law, do, by the authority wherewith we are invested, confirm the aforesaid election made and celebrated of the person of the said Reverend James Prince Lee, clerk, M.A., to the Bishopric of Manchester : And we do, so far as in our power and by law we may, supply all defects whatsoever in the said election, if any there happen to be : And we do commit unto the said Bishop elected and confirmed the care, government, and administration of the spirituals of the said Bishopric of Manchester : And we do pronounce, decree, and order, by this our Definitive Sentence or final Decree, which we make and publish in these presents, that the said Bishop, so elected and confirmed, or his lawful Proctor for him, shall be inducted into the real, actual, and corporal possession of the said Bishopric, and of all its rights, dignities, honours, privileges, and appurtenances whatsoever, and be installed and enthroned by any person lawfully authorized in this behalf, according to the laudable and approved custom in like cases observed, not being contrary to the laws and Statutes of this realm."

Proctor.—The Lord Bishop elected and confirmed and myself pray a Public Instrument and Letters Testimonial to be made out of and concerning the premises.

DR. BURNABY.—We do decree as prayed.

R. Townsend, Proctor for the Dean and Chapter.

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*Confirmation
of the election
of the Bishop
of Hereford.*

THE REVEREND RENN DICKSON HAMPDEN, D.D., LORD ELECTED BISHOP OF HEREFORD. — The confirmation of the election of the Reverend Renn Dickson Hampden, D.D., to be Bishop of Hereford, took place at the Church of St. Mary-le-Bow, Cheapside ; the Commissioners appointed by

the Archbishop of Canterbury being his Vicar-General (Dr. Burnaby), Dr. Lushington, and Sir John Dodson.

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The form of obtaining the consent of the Bishop elect having been gone through in the Dining Room of the Hall of the College of Advocates, Doctors' Commons, the Commissioners, the Bishop elect, and the proper officers proceeded to Bow Church, where the Litany was read by the Rector of the parish.

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Bayford and *Twiss*, Drs., appeared as Advocates for the Dean and Chapter and Bishop elect; *Addams*, *Harding*, and *R. Phillimore*, Drs., as Advocates for the Opposers.

The Proctor for the Dean and Chapter exhibited his Proxy, and presented the Letters Patent, which were read. He then prayed that the confirmation might proceed according to law, which was decreed, and having presented the Bishop elect, prayed that opposers might be publicly called, which was directed.

A Proctor (Mr. R. Townsend) appeared for the Rev. Opposers. Richard Webster Huntley, Clerk, Vicar of Alderbury, in the county of Salop and diocese of Hereford, Master of Arts of the University of Oxford; the Rev. John Jebb, Clerk, Rector of Peterstow, in the county and diocese of Hereford, Master of Arts of Trinity College, Dublin; and the Rev. William Frederick Powell, Clerk, Perpetual Curate of Cirencester, in the county of Gloucester, Master of Arts of the University of Cambridge, and exhibited Proxies under their hands and seals respectively, and declared he opposed the confirmation of the election of Dr. Renn Dickson Hampden, Lord elected to the office or dignity of Bishop of Hereford.

THE VICAR-GENERAL.—We are acting here under a Mandate from the Crown, issued pursuant to the provisions of the Statute 25th Henry 8, c. 20, and we conceive ourselves bound to confirm, without suffering any opposition, let, or hinderance.

Mr. Townsend.—Right worshipful Sir, I will bring in a Libel.

DR. LUSHINGTON.—No, you will not. You are not permitted to appear; and, Mr. Townsend, you know perfectly

1848. well, as an ecclesiastical practitioner, that you are not
 JAN. 11. competent to bring in a Libel until you are permitted to
 appear.

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Dr. Addams.—I appear for—

Dr. Bayford.—I object to this, on behalf of the Dean and Chapter. The Court has already decided that Mr. Townsend cannot appear.

Dr. Addams.—I appear and beg to be heard—

The VICAR-GENERAL.—Upon what do you wish to be heard?

Dr. Addams.—Upon the Statute.

Title to appear. The VICAR-GENERAL.—You mean upon the question, whether you have a right to be heard or not?

Dr. Addams.—Precisely so.

The VICAR-GENERAL.—We confine you to that.

Dr. Addams.—I do not mean to say a word beyond that point.

DR. LUSHINGTON.—Distinctly understand to what you are confined, namely, to the question whether, considering the Statute of Henry 8, which has been referred to, you have a right, notwithstanding that Statute, to be heard at all.

ARGUMENT.

Dr. Addams.—I will confine my observations to that. I undertake to satisfy the Court that that Statute has nothing whatever to do with the present question, and I shall be exceedingly surprised if their ultimate decision should be, that it is incompetent to them to entertain any objection to the confirmation of the Lord elected Bishop of Hereford, by reason of any provisions of that Statute; and, after considering what the true construction of that Statute is, I shall be surprised indeed if this Court decline to entertain the objection under the supposition that, by so doing, they will fall within the penalties of *præmunire*. It will be necessary to begin with a brief reference to the history of the introduction of this Statute. Bishoprics, it is well known, were anciently donative by the prince, by the mere conveyance of the ring and staff. Afterwards, the election was by the Chapter; and was supposed to be a free election, but founded upon the *Congé d'élire*. It is agreed that the con-

firmation and consecration of a bishop so elected belonged to the Pope, whereby the Pope had in effect the disposal of all the bishoprics in England.* But the Popes were not content with merely the confirmation and consecration, but insisted on various occasions upon collating or nominating to bishoprics, and that produced the first enactment, 25th Edw. 3, st. 6. That Statute provided (s. 3) that the free elections of archbishops, bishops, and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the King's progenitors, and the ancestors of other lords, founders of the said dignities and other benefices; "and in case that reservation, collation, or provision be made by the Court of Rome of any archbishopric, bishopric, dignity, or other benefice, in disturbance of the free elections, collations, or presentations aforementioned, that at the same time of the voidance that such reservations, collations, and provisions ought to take effect, our Lord the King and his heirs shall have and enjoy for the same time the collations to the archbishoprics and other dignities elective which be of his advowry, such as his progenitors had before that free election was granted, since that the election was first granted by the King's progenitors upon a certain form and condition, as to demand license of the King to choose, and after the election to have his Royal assent, and not in other manner; which conditions not kept, the thing ought by reason to resort to its first nature." So the matter stood until the reign of Henry 8, and then, in the first place, there was a Statute against payment of Annates to the see of Rome (23 Henry 8, c. 20), and which was undoubtedly the foundation of the Act 25 Henry 8, c. 20. It contained provisions against Annates and all such payments, and that if any person should be delayed from a bishopric by restraint of Bulls Apostolic, he should be consecrated here in England by the Archbishop of the Province. This was evidently directed against the usurpations of the Papal See. It was passed at the very commencement of the Reformation, when we were

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* 1 Inst. 134. Gibs. 104. 3 Salk. 71.

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in something of an intermediate state ; the Pope was styled in that Act "His Holiness," and "our Holy Father;" and the gist of it was, that if the Pope would moderate his demands, and not exact to the extent he had done, the payments to him might continue. Clearly, at that time the jurisdiction of the Pope in these matters was not altogether denied : indeed, there was a letter immediately following this Statute, written in the year after, from Henry 8 to the Pope, commencing, "After most humble commendations, and most devout kissing of your blessed feet;" and, after this, notwithstanding this Act, when Cranmer came to be confirmed and consecrated Archbishop of Canterbury, Bulls for that proceeding were obtained from Rome ;* but they were the last Bulls received in England in this King's reign. Immediately following the consecration of Cranmer there was the sentence of divorce, and, following upon that, was the final breach between Henry 8 and the Pope, which was declared by a Statute prohibiting in future all appeals to Rome under the penalties of *præmunire*. Then followed the Statute relating to the matter now in hand,—25 Henry 8, c. 20. It recited the Act respecting Annates, and then went on (sec. 3) :—"Forasmuch as in the said Act it is not plainly and certainly expressed in what manner and fashion Archbishops and Bishops shall be elected, presented, invested, and consecrated within this realm, and in all other the King's dominions, be it now therefore enacted that the said Act and every thing therein contained shall be and stand in strength, virtue, and effect ; except only, that no person or persons hereafter shall be presented, nominated, or commended to the said Bishop of Rome, otherwise called the Pope, or to the see of Rome, to or for the dignity or office of any Archbishop or Bishop within this realm, or in any other the King's dominions," &c. The next section provided, that at every avoidance of a Bishopric the King might grant to the Dean and Chapter a License to proceed to election, with a Letter Missive, containing the name of the person they should elect ; by virtue of which License they should in due

* Burnet, Hist. Ref., vol. 1, p. 259.

elect such person, and none other ; and if they should
 or delay their election above twelve days after deli-
 of the License or Letters Missive to them—what then?
 at they should incur the penalties of a *præmunire*? No ;
 the King should nominate a Bishop. Sect. 5 provided,
 ie case of such a nomination by the King, that such
 on should be invested and consecrated without suing,
 iring, or obtaining any Bulls or other things at the see
 ome ; and, as to the case of election, if the said Dean
 Chapter, after such License and Letters Missive to them
 ted, within twelve days, do elect the person mentioned
 e Letters Missive, according to the request of the King,
 their election shall stand good and effectual to all
 ts ; and that the person so elected, after certification
 : of the election, under the common seal of the elec-
 to the King, shall be reputed and taken by the name
 rd elected of the said dignity and office ; and then,
 ng such oath and fealty only to the King as shall be
 inted, the King, by his Letters Patent under the great
 shall signify the election to the Archbishop and Metro-
 an of the Province, requiring and commanding such
 ishop to confirm the election, and to invest and conse-
 the person so elected, and to give and use to him all
 benedictions, ceremonies, and other things requisite for
 same, without any suing, procuring, or obtaining any
 s, Letters, or other things from the see of Rome. The
 ection inflicted the pains and penalties of *præmunire* ;
 for what ? If the Dean and Chapter proceed not to
 ion, and signify the same, within twenty days after the
 use came to their hands. If within twelve days they
 not proceed to election, or did not choose the person
 ed by the King, or chose some one else, they acted con-
 to the Act ; but there was no penalty, and the only
 equence was, that the Crown nominated and presented ;
 if they did not proceed to an election at all within
 ty days, they incurred a *præmunire*. The section went
 o inflict the same penalties of *præmunire*, “ if any Arch-
 yp or Bishop, within any of the King’s dominions, after
 such election, nomination, or presentation shall be sig-

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nified unto them by the King's Letters Patent, shall refuse, and do not confirm, invest, and consecrate with all due circumstance as is aforesaid, every such person as shall be so elected, &c., and to them signified as is above mentioned, within twenty days next after the King's Letters Patent of such signification or presentation shall come to their hands;" or if they or any other person admit, allow, or do "any other process or act to the contrary or let of due execution of this Act;" which provided that Bishops should be consecrated without any reference to the see of Rome. The writ of *præmunire* was so called from its commencing with the words *præmunire* (a barbarous corruption of *præmoneri facias*; and the offence against which the writ of *præmunire* was directed was the maintaining of Papal usurpations, in derogation of the authority of the Crown; nor can the penalties of that offence be incurred by any other than such act, except only where those penalties are inflicted expressly by Statute for other offences, as in the case of assisting in an illegal marriage of any of the Royal family. What has been the interpretation put upon the Statute? The precedents are all one way. There are none in the reign of Edward 6, because an Act was passed in the first year of his reign, by which all those processes were abolished, and Bishoprics were made donative by Letters Patent. In the reign of Mary the realm was reconciled to the Pope; but in the reign of Elizabeth the realm again became Protestant, and Parker was her first Archbishop. Burnet, after stating Parker's reluctance, says, "In the end, he was with great difficulty brought to accept of it: so, on the 8th day of July, a *Congé d'élire* was sent to Canterbury; and upon that, on the 22nd of July, a Chapter was summoned, to meet the 1st of August, where the Dean and Prebendaries meeting, they, according to a method often used in their elections, did by a compromise refer it to the Dean to name whom he pleased, and he naming Dr. Parker, according to the Queen's Letter, they all confirmed it, and published their election, singing *Te Deum* upon it. On the 9th of September the Great Seal was put to a warrant for his consecration, directed to the Bishops of Duresme, Bath and Wells, Peterborough,

Landaff, and to Barlow and Scory (styled only Bishops, not being then elected to any sees), requiring them to consecrate him. From this it appears that neither Tonstal, Bourn, nor Pool were at that time turned out. It seems there was some hope of gaining them to obey the laws, and so to continue in their sees. This matter was delayed to the 6th of December. Whether this flowed from Parker's unwillingness to engage in so high a station, or from any other secret reason, I do not know. But then, the three Bishops last named refusing to do it, a new warrant passed under the Great Seal to the Bishop of Landaff; Barlow, Bishop elect of Chichester; Scory, Bishop elect of Hereford; Coverdale, late Bishop of Exeter; Hodgkins, Bishop Suffragan of Bedford; John, Suffragan of Thetford; and Bale, Bishop of Ossory; that they, or any four of them, should consecrate him. So by virtue of this, on the 9th of December, Barlow, Scory, Coverdale, and Hodgkins met at the church of St. Mary-le-Bow, where, according to the custom, the *Congé d'élire*, with the election, and the Royal assent to it, were to be brought before them; and these being read, witnesses were to be cited to prove the election lawfully made; and all who would object to it were also cited. All these things being performed according to law, and none coming to object against the election, they confirmed it, according to the usual manner." So that a practice had grown up then, as now; and who could suppose that opposers were cited, if they were not to be heard? Further, on this point of precedents, Burn* sets forth that opposers are to be cited and called, adding, "if any appear, it seemeth that they shall be admitted to make their exceptions in due form of law;" and he cites a case,† occurring early in the reign of Charles I, in the palmy days of the Church,—that of Dr. Montagu, Bishop of Chichester, whose confirmation was objected to by a person who had no particular interest, and whose exceptions were rejected because they were "not offered in form of law; particularly, were neither given in

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* Eccl. Law, tit. "Bishops," s. 2.

† Collier, Eccl. Hist., vol. 2, p. 745.

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writing, nor signed by an Advocate, nor presented by any Proctor of the Court." Burn adds:—"The Parliament, not at first apprized in point of form, were dissatisfied with the conduct of the Vicar-General, and inquired into the behaviour of Dr. Rives on that occasion. Upon which it hath been observed, that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the Parliament of that time proceeded upon the same opinion." Dr. Rives did not conceive that he should have incurred the penalties of *præmunire* by receiving the exceptions if they had been taken in due form. Neither would this Court incur those penalties by hearing the exceptions, if they should prove to be taken in due form.

Dr. Harding, on the same side.—These three clergymen appear, to save their contumacy, all persons having objections to the confirmation being cited to appear. Besides, this being a Court, and all persons being called upon, any one offering to appear according to the forms of the Court has *prima facie* a right to be heard. If the Court has no apprehension of a *præmunire*, by what law could the Court consider itself called upon to go through such a mockery of justice in this consecrated place, calling upon all persons to appear, and then denying the right of any person who appeared in the most solemn forms of ecclesiastical law to be heard? Assuming that the Statute of Henry 8 is the impediment, a penal Statute (and this is a highly penal Statute) is to be construed strictly; it ought to be expounded according to the intent of them that made it, where the words are doubtful and uncertain, and according to the rehearsal of the Statute;* and the words must be taken in their lawful and rightful sense.† If there is a penalty imposed by the Statute, it is only upon such as should not elect pursuant to the Act, or should oppose the confirmation of the person "so elected," that is, "in due form elected." If this Court refuse to hear the opposers, *non constat* that they are not prepared to prove that Dr. Hampden has not been elected

* 3 Inst. 390.

† 1 Inst. 381 b.

at all, or has been chosen by persons who had no right to elect; or that the person elected was not under a legal disability. In *Evans v. Ascuihe*,* 3 Car. 1, decided in the Court of King's Bench, when the circumstances under which the Statute was passed were fresh in recollection, the Judges stated the manner of making Bishops, and they said that the Archbishop was to examine the election and the ability of the person. The intention of the makers of the Statute was directed against Romish usurpation. The doubt arises upon section 7, which inflicts *præmunire* upon persons who should "admit, maintain, allow, obey, do, or execute any censures, excommunications, interdictions, inhibitions, or any other process or act"—but that must be confined to processes or acts *ejusdem generis*—"to the contrary or let of due execution of this Act." That cannot include the appearance of a party pursuant to Citation, or the hearing his objections.

Dr. R. Phillimore, on the same side, cited the following passage, from Fuller's *Church History*,† to shew that, in Montagu's case, the only reason why the exceptions were rejected was their informality:—"There is a solemnity performed before the consecration of every Bishop, in this manner:—the Royal assent being passed on his election, the Archbishop's Vicar-General proceeds to his confirmation, commonly kept in Bow Church. A process is issued forth to call all persons to appear, to shew cause why the elect there present should not be confirmed. For, seeing a Bishop is in a manner married to his see (save that hereafter he taketh his surname from his wife, and not she from him), this ceremony is a kind of asking the banns, to see if any can allege any lawful cause to forbid them. Now, at the confirmation of Mr. Mountague, when liberty was given to any objectors against him, one Mr. Humphreys (since a Parliament Colonel, lately deceased), and William Jones, a stationer of London (who alone is mentioned in the Record), excepted against Mr. Mountague, as unfitting for the episcopal office, chiefly on this account,—because lately censured by Parliament for his book, and rendered incapable of all prefer-

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* W. Jones, 158. Palm. 457.

† Cent. xvii. b. 11, 68.

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ment in the Church. But exception was taken at Jones's exceptions, which the Record calls *prætextos articulos*, as defective in some legal formalities. I have been informed, it was alleged against him for bringing in his objections *viva voce*, and not by a Proctor, that Court adjudging all private persons effectually dumb who speak not by one admitted to plead therein. Jones returned that he could not get any Proctor, though pressing them importunately, and proffering them their fee, to present his exceptions, and therefore was necessitated *ore tenus* there to allege them against Mr. Mountague. The Register* mentioneth no particular defects in his exceptions; but Dr. Rives, Substitute at that time for the Vicar-General, declined to take any notice of them, and concludeth Jones amongst the contumacious, '*quod nullo modo legitimè comparuit, nec aliquid in hac parte juxta juris exigentiam diceret, exciperet, vel opponeret.*'"

Dr. Bayford, on behalf of the Chapter, was stopped by the Court.

The VICAR-GENERAL.—Notwithstanding the very able arguments which we have heard, I am of opinion that we are bound to proceed to the confirmation of Dr. Hampden to the bishopric of Hereford, under the provisions of the Statute 25 Hen. 8, which appears to me clearly to extend to the present case, and by which, should we commit or suffer any let or hinderance to such confirmation, we should become liable to the penalties of *præmunire*. As regards forms, the Act itself prescribes no mode of proceeding in the performance of the duty enjoined, nor refers to any; the office whence these proceedings originate supplies none beyond the form now in use, and which has prevailed and been acted upon for a period of 300 years. The Citation and Preconization may seem to imply the existence of others, in the call made by them upon opposers to appear and make their objections, if they have any; but how these objections are to be received, in what form to be made, how to be

* Registrum Cantuar., fol. 140, in anno 1628.

proved or sustained, and with what result, is nowhere, that I can find, laid down, with reference to the confirmation of Bishops in England, by any writer on the subject, or by any book of authority relating to the Canon and Ecclesiastical Law, or the practice thereof, as prevailing and established in this country. Whether in the Codes of other countries any such forms of procedure are to be found, grounded upon the Canon Law, or the Decrees of Councils, I am unable to say. In the present case, we are bound by the Statute Law of the realm, which affords us no alternative but that of confirming the election which is certified to have been made by the Dean and Chapter of Hereford, or subject ourselves to the pains and penalties of *præmunire*.

DR. LUSHINGTON.—The question which is now to be decided is, in the first instance, whether the parties who have attempted to appear are entitled to appear and to be heard before the Commissioners of his Grace the Archbishop of Canterbury. Now, if they were entitled to appear before this Court, it would almost of necessity follow that they would be entitled to be heard, and that their objections must be discussed and disposed of by the authority of the same tribunal. But that this Court could have power to examine into any case regarding the life, conduct, or proceedings of a person chosen to be a Bishop of this realm, since the passing of the Clergy Discipline Act, I entertain great and serious doubts. I apprehend that it would be impossible for us under any circumstances to enter into the consideration of any one fact or circumstance forming a charge or offence comprised within that Statute. But it is not necessary to follow up this consideration; for it is our duty to look, in the first instance, to the Statute passed expressly for the regulation of our conduct upon the present occasion. The Statute which has been so often referred to, and read in great part by Dr. Addams; is a Statute truly described to have been passed at the commencement of the Reformation: a Statute memorable, no doubt, for all its provisions, and not the less so because it restored to the Crown of Great Britain its undoubted right, and put to sleep for ever the pretensions of

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the Bishop of Rome: a Statute to be held, therefore, in reverence, and to be carried into execution to the full extent of its spirit and its letter. Now, what are the words of that Statute? The words of the Statute admit, as I think, of no doubt whatever. After having recited that, in the Act 23 Hen. 8, "it was not plainly and certainly expressed in what manner and fashion Archbishops and Bishops should be elected, presented, invested, and consecrated," it goes on to enact, in express terms, first, that "the said Act, and every thing therein contained," that is, relating to the payment of Annates, "shall be and stand in strength, virtue, and effect," except only, that no person shall be presented to the see of Rome; and after having confirmed the former Act, therefore, in every respect but one, it prescribes minutely, in the 4th, 5th, and 6th sections, the form of proceeding. Now the form of proceeding is this: the Crown issues a *Congé d'élire* to those who have the right to elect Bishops, and, at the same time, a Letter Missive, containing the name of the person to be elected. We need not enter into a discussion of the question, what would be the state of the case supposing there had been no election at all, because there is presented to us the record of an election under the corporate seal of the Dean and Chapter of Hereford, and beyond that corporate seal we cannot go. The Statute then requires and commands the Archbishop, to whom a signification shall be made, "to confirm the said election, and to invest and consecrate the person so elected to the office and dignity that he is elected unto." If this were the only passage in the Statute, it is directory to the Archbishop, whose Commissioners we are, to proceed to the confirmation of the person so chosen. I think that this is not a place nor an occasion in which it would be becoming in us to enter into a long and minute examination of the arguments, or of the cases which have been cited. Nor is it in the slightest degree necessary that we should hold that the penalty of *præmunire* would attach, if we should allow parties to appear and be heard as opposers. It may be so; perhaps the better opinion is, that it would attach; but if we are ordered to proceed to confirmation, and there is nothing in

this Statute which gives us a discretion in exercising the power so confided to us, then, I apprehend, it becomes our bounden duty to proceed accordingly. I will advert briefly—it shall be very briefly—to what are called precedents. It appears that, from the passing of this Statute of 25 Hen. 8 up to the present time, there have been two instances—and two instances only—which are said to savour of precedents. With respect to the case of Archbishop Parker, I am unable to collect from the statement of Dr. Addams that that throws any light upon the construction of this Statute; and I must say that it is impossible to take the construction of a Statute from a book like the work of Bishop Burnet on the Reformation: the observations of persons not lawyers would not enable us to form a just and legal conclusion. With regard to the case of Bishop Montagu, I must express my opinion very confidently that that was a case in the worst possible times. At what period did it occur? At a period when the Parliament were usurping the rights of the Crown, and the Crown trenching upon the privileges of the Parliament. It appears quite evident that this precedent occurred—if precedent it be termed—in times when no reliance could be placed upon the decision of any Court whatsoever. For what right had the House of Commons to interfere with regard to the question, whether Dr. Rives had or had not done his duty upon that occasion? Is it not perfectly evident that Dr. Rives, acting as he did upon that occasion, might—I will not say that he was—but might have been, actuated by a fear of encountering the wrath of the House of Commons of those days, and so resorted to the technical evasion, that the Articles had not been signed properly? But am I to come to the conclusion that, because he rejected them for want of form, therefore he would have received them if they had been in form, in the teeth of this Statute, without finding it recorded in any book whatever that any such expression ever came from the mouth of Dr. Rives?—for, it is a mere innuendo, which some persons have thought fit to affix upon his conduct. There are other points with regard to the form of proceeding, and the alleged inconsistency of citing persons to appear and then

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not hearing them. Why, no doubt there may be an inconsistency in these modes of proceeding; indeed, I think it would be vain to deny that such is the case. But what are the facts? The times when this Statute was passed were times when we were emerging from the power of the Papacy into the freedom of the Reformation, and when the practice, and I am sorry to say the principles, too, vacillated; and is there any wonder that a sovereign upon this throne, in those times, should be anxious to retain the ancient form, though at the same time anxious to engross into his own hands the real power? I shall follow this up no further than by expressing my conviction, as one of the Commissioners,—without saying that any one would incur the penalty of *præmunire*,—that I conceive it my duty to refuse to allow the appearance which is now offered, and to proceed to the confirmation of Dr. Hampden.

SIR J. DODSON.—I have only to express my entire concurrence in the judgment which has been given.

The confirmation was then proceeded with, the same forms being observed, *mutatis mutandis*, as in the preceding case.

Jan. 14.

In the Court of Queen's Bench, *Sir F. Kelly*, Q.C., moved for a Rule to shew cause why a *Mandamus* should not issue, directed to the Most Reverend Father in God, William Lord Archbishop of Canterbury, Primate of all England and Metropolitan, and to his Vicar-General, Sherrard Beaumont Burnaby, Doctor of Laws, commanding them, or one of them, at a Court to be therefor duly holden in the cause, or business, or matter of the confirmation of the election of the Reverend Renn Dickson Hampden, Doctor of Divinity, to the Bishopric of Hereford, to permit and admit to appear in due form of law the Rev. Richard Webster Huntley, Clerk, Master of Arts of the University of Oxford, Vicar of Alderbury, in the county of Salop and diocese of Hereford; the Rev. John Jebb, Clerk, Master of Arts, of Trinity College, Dublin, Rector of Peterstow, in the county and diocese of Hereford aforesaid; and the Rev. William Frederick Powell,

Clerk, Master of Arts of the University of Cambridge, Perpetual Curate of Cirencester, in the county of Gloucester, to oppose the said confirmation of the said election of the said Doctor Renn Dickson Hampden, and to hear and determine upon such opposition, and upon the articles, matters, and proofs thereof.

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The application was founded upon an affidavit of the parties on whose behalf it was made, and their Proctor, which set forth that, on the occasion of the confirmation of the Bishop elect, on being asked by the Vicar-General whether he had got his objections in writing, Mr. Townsend, the Proctor, proposed to hand in a Libel, which was refused, and the Vicar-General would not allow him to appear or to be heard; that the Court refused to hear any argument, except on the preliminary question whether the opposers were entitled to appear and to be heard; and, without hearing any one on the other side, determined that they were bound by the Statute of Henry 8 to reject all opposition, to deny all parties the right to be heard, and simply to obey the mandate of the Crown and to confirm the Bishop, and then proceeded to pronounce sentence of confirmation accordingly. They further deposed, that "the opposition so intended to be made to the then present confirmation of the election of Dr. Hampden to the Bishopric of Hereford was founded upon two books, written, printed, and published by him, the avowed purport or object of the first of the said books being to illustrate the injurious effects of dogmatism in theology; and in both books, in illustration of the (supposed) effect of dogmatism in theology, it is well known, or justly suspected, that, whether so by him intended or not, he hath in fact spoken or declared in the manifest derogation or depraving of many things in the Book of Common Prayer, and maintained or affirmed divers doctrines repugnant, or at least contrary, to the Thirty-nine Articles of the Church of England, especially those, or most or many of them, particularly concerning faith and doctrine: and these deponents further say, that expressly by reason of or with reference to such his two books aforesaid, he, the said Dr. Hampden (then recently

1848. appointed Regius Professor of Divinity in the University of
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 censure of that University, and which censure (the said Dr.
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Hareford. explained, or removed, or retracted those parts of his teaching which have led to his being so justly suspected as aforesaid) was, in effect, re-affirmed by the said University in the year of Our Lord 1843: and these deponents further say, that Articles, alleging and setting up such unsoundness of doctrine and teaching of the said Dr. Hampden, had been prepared and signed by certain learned civilians, ready to be given in as aforesaid, had the said parties been permitted to appear, and which these deponents are advised and believed to present and contain sufficient ground of opposition to the confirmation of the said Dr. Hampden; and the deponent, the said Richard Edward Austin Townsend, was ready to bring in, in due form of law as aforesaid, and then and there, if called on so to do, to sustain by proof."

The Court (Lord Denman, C. J.; Patteson, Coleridge, and Erle, JJ.) granted the Rule *nisi*.

JAN. 24, 25, Cause was shewn against the Rule, on behalf of the
 26, & 27. Archbishop of Canterbury, by the *Attorney* and *Solicitor-General* (instructed by the Government, with the consent of the Archbishop), Mr. M. D. Hill, Q.C., Dr. Bayford, and Mr. Waddington. The Rule was supported by Sir F. Kelly, Dr. Addams, Mr. A. J. Stephens, Mr. Peacock, and Mr. Baddeley.

FEB. 1. The Judges were equally divided,—two being of opinion that the Rule should be discharged, and two that it should be made absolute. The following is a summary of their respective judgments.

JUDGMENT. ERLE, J.—The question depends upon the construction of the Statute 25 Hen. 8, c. 20. Upon a review of that Act, it appears that the power of nominating Bishops is given to the King, and that the Archbishop has no authority to judge whether the King has properly exercised that power: on the contrary, the Archbishop is made liable to the penalties of *præmunire* if he shall not, within twenty

days, confirm, invest, and consecrate the Bishop whose election has been signified to him by the King's Letters Patent. It is not contended that the Archbishop is to sit and judge of the King's nomination: when the Bishop has been elected by the Dean and Chapter, the King is to signify that election by his Letters Patent, and to require the Archbishop to confirm it. Does the word "confirm" mean that the Archbishop is to try the qualifications of the person elected? According to the general rule, the words of the Statute are to be construed in their ordinary sense; whence it follows that the command to confirm does not involve any authority to judge of the fitness of the person elected. The election by the Dean and Chapter is to be "good and effectual to all intents," which it cannot be if voidable by the Archbishop. It is said that the word "confirm," in reference to Bishops, has a technical sense in the Canon Law, and includes an examination into the qualifications of the elected; that this power was exercised throughout the whole Christian world down to the time of Henry 8, and that the Legislature intended the word to be taken in that sense. But the reception of evidence of extrinsic facts, with a view to alter the received meaning of known words, is not to be permitted; and besides this, it does not appear to me that the alleged practice has been proved. There is no foundation in fact for the assertion that the Legislature referred to that part of the Canon Law which has been cited, and which was pertinent to contested elections by large numbers, but not to a nomination by the King. Besides, the foreign Canon Law has no binding effect in England. The proclamation made at the time of the confirmation can be of no avail against the Statute, which renders both the election and confirmation mere forms,—the vestiges of rights that have ceased; otherwise the right of opposing would have been asserted, whereas no such instance has been produced. The opinions of all the text-writers, from Lord Coke, are of positive force against the right. The intention of the Statute was not, as contended, to put an end to the interference of the See of Rome with the English Church; but, as expressed, to prohibit such interference,

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and at the same time to lay down the manner of consecrating the Bishops of the Church so separate from the See of Rome. Effect must be given to every part of the Statute, which not only destroys the Pope's usurpation, but declares the rights of the King, and was intended to put an end to all contests between the Crown and the Ecclesiastical authorities. The Rule must be discharged.

COLERIDGE, J.—I rest my judgment on this narrow ground, that the applicants have laid such reasons before the Court as entitle them to a *Mandamus*, in order that it may be demurred to, or met by a return. If this be the case of an inferior Court, with a question before it for decision, with parties lawfully summoned to appear, and with sufficient interest to entitle them to be heard; then it is within the province of this Court to compel the inferior Court to allow those parties to appear, and to hear their allegations. We compel the Ecclesiastical Courts to address themselves to the discharge of their duty, and restrain them when it is shewn that they are about to exceed their jurisdiction. If the confirmation was all a shadow, no one could have any interest; but two of the parties, as incumbents in the diocese, have a deep interest in the faith and doctrines of their Bishop. In considering the Statute of Henry 8, the question is, what is the import of the word "confirm?" If confirmation be a solemn judicial act, usage cannot contradict it, nor disuse render it obsolete. By the practice of this Court, absolute certainty, either in fact or law, is not required before granting the writ: if the matter of fact be made probable, we leave it to a jury to decide the fact, and we allow the matters of law to remain on the record, in order that our decision may be reviewed by a higher tribunal. If we refuse the Rule, we prevent all inquiry. The case of the applicants is, that there were four great General Councils held, whose authority is recognized in matters of doctrine by the Statute of Elizabeth, two of which (those of Nicæa and of Chalcedon) say that no Bishop can be confirmed "*præter voluntatem metropolitani*." The fact, of the necessity of confirmation by the metropolitan, is established by a

large body of evidence antecedent to the rise of the Canon Law, which, it is not denied, required such confirmation, and treated it as a judicial proceeding. The Canon Law in this country was subject to the Statute Law; but as a general rule, our Ecclesiastical Courts have governed themselves by the Canon Law; and it is necessary to shew that that law, which adopted what was decreed by Councils, has not been adopted in this country. There are numerous instances of the exercise of the power of confirmation by the metropolitan from 1277 to 1416. The objects of the Statute 25 Hen. 8, c. 20, were, to put on a clear foundation the right of the Crown as to the appointment of Bishops, and to prevent the interference of Rome in the making and confirmation of Bishops. There is not a word in the Statute to derogate from the power of the metropolitan, which was rather increased by the removal of the Pope's interference. The silence of the Statute on the subject of qualification arises from the fact that it was passed *alio intuitu*. The question turns on the meaning of the word "confirm." The Archbishop is to confirm and consecrate; but no direction is given him how he is to confirm. If, when the Statute was passed, he had asked "How am I to confirm?" the answer must have been, "As before the Act." If before the Statute he was bound to examine at confirmation, so is he now. If the construction of the word "confirm" contended for be correct, the Archbishop would be bound to confirm any one who might be elected, if he were a heretic, an infidel, a bad liver, or disqualified by age or want of Orders. I think confirmation and consecration cannot be separated; and the Office for Consecration shews that the Archbishop does not act merely ministerially. I cannot believe that a Statute which, though with a rough hand, freed us from the vexatious interference of Rome, at the same time intended that our Archbishops should be liable to these penalties if, in the discharge of a most solemn duty, they refused to confirm the election of a Bishop who might be disqualified for that sacred office. Forms established by usage become binding, and all lawyers know that it is by forms that rights are substantially protected. For more than three

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hundred years these forms have taken a judicial shape in open Court; and although it has been urged that there has been a total want of the exercise of this right since the Reformation, this has not been satisfactorily made out. It seems to me that this Rule ought to be made absolute.

PATTESON, J.—The Canon Law establishes that, in all Christian countries, and wherever and however Bishops were elected, such election was required to be confirmed in order to be perfect; that such confirmation was a judicial, not a ministerial act, and which required examination into the process of the election, and the qualifications of the person elected. All Christian people were interested, and therefore all persons were cited generally, and in some instances individuals were cited specially, to come and state their objections, and such citation was practised in this country before the Statute of Hen. 8. Before and at the time of the passing of that Act, the election of Bishops required to be confirmed; that confirmation was a judicial act, and all persons were cited to make their objections. Several instances (previous to the Statute of Hen. 8) of Archbishops refusing to confirm were cited (in Argument) from Wharton's *Anglia Sacra*, upon objections to the qualifications of the parties elected, in which the elections were annulled. It is established by the authorities, that, when the Statute 25 Hen. 8 passed, confirmation was a judicial act. By that Statute, the Archbishop is not required, in express terms, to confirm without inquiry, or in any other than the usual form. If the Statute had not introduced the Letters Missive, the election must have been free, and the confirmation must have been clearly a judicial act. The Letters Missive make the election a mere form: does it also make the confirmation a mere form? It is said that the election is to stand "good and effectual to all intents;" so that the refusal to confirm cannot affect the election. It may be that the election is to stand good as an election, but the Statute has made no provision for the refusal of the Archbishop to confirm, and has, therefore, in some sense, placed it in the power of the Archbishop to refuse, subject to the penal con-

sequences of refusal. The Legislature seems to have considered that confirmation was not necessary where there was no election ; and in the Irish Statute, which abolishes election, no mention is made of confirmation. I am required, without any express words to that effect, to say that the Legislature intended to carry forms into the confirmation, as well as into the election, of Bishops ; but I cannot go beyond what the express words compel me, and I construe the words according to their common sense. It appears to me that, by the fifth section, the Archbishop is required to conduct the confirmation as of old time, as hath been accustomed, *i.e.* in a judicial manner. The seventh section requires him to confirm the election within twenty days, under the penalties of a *præmunire* ; it has been hence argued that confirmation cannot be a judicial inquiry ; but it does not lead to such a consequence ; and in the fifth section nothing is said about the time when, after an election, the confirmation is to be made. The true meaning of the seventh section is, that, if the Archbishop shall refuse, *without lawful cause*, to confirm within twenty days, he shall be liable to the penalty. All laws require to be construed in that way. A *bonâ fide* belief of the unfitness of the Bishop elect would be a lawful cause. If confirmation be a judicial act, there is nothing in the seventh section which would subject the Archbishop to those penalties, if he proceeded *bonâ fide*. The construction I put upon the Statute does not derogate from the prerogative of the Crown ; it does not give the Archbishop power to put a *veto* upon the nomination of the Crown, but only the exercise of his ancient power. The disuse of a power or authority will not destroy it. If confirmation is a ministerial and not a judicial act, a solemn mockery has been gone through ; but if it is a judicial act, the parties are entitled to appear and make their objections. There is no sufficient evidence to shew that the Statute was intended to alter the nature of confirmation. The next question is, who are entitled to be heard ? The words of the Citation, since the Statute of Hen. 8, are, that "all persons" may come forward and make their objections. A notice to this effect is proclaimed in the Church. The

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Vicar-General, then, was not justified in refusing to hear objections unless he was prevented by the Statute. He was bound by law to hear them, as "all" were cited, and as two of the applicants are beneficed clergymen in the diocese of the Bishop elect, they ought to have some remedy. Then is the writ of *Mandamus* the proper remedy? I doubt whether there would be an appeal from the Archbishop under any circumstances. The case of *Rex v. Justices of Kent** is in point. The *Mandamus* put them in motion; but it did not direct them how to act. Here is a declining of jurisdiction in consequence of a misconstruction of a Statute. I have had great doubts as to the power of this Court to grant a *Mandamus*, under the circumstances, and my mind has fluctuated both during the Argument and during the Judgment of my brother Erle. Formerly, the decree of this Court was final; now, its judgment may be reviewed by a Court of Error; and considering that, by refusing the writ we prevent the parties from appealing against our decision, whereas, if we grant the writ, it will only lead to a fuller consideration and more satisfactory determination of the question, I think, unless our minds are quite clear that the applicants have not the right they claim, we ought to grant the writ, and that the Rule must be made absolute.

LORD DENMAN, C.J.—I have no doubt that the writ sought for ought not to issue; and even if I were at all in doubt on the subject, I should think it better not to issue the writ than to run the risk of abridging the clear and established prerogative of the Crown in a matter of such vital importance, still more to the best interests of the people than of the Crown itself. I admit that there has been established a *prima facie* case of wrong; the proceeding, by which opposers were invited to appear, and then had their mouths stopped at the very outset, reflects no honour upon those who instituted the form. It is an absurdity only exceeded by the further proceeding of declaring those very persons contumacious for non-appearance who had actually

* 14 East, 395.

appeared, and, claiming to be heard, were not heard. That these things are anomalies there can be no doubt; but they do not constitute a case for setting aside a clear and established rule, founded on a distinct Act of Parliament, and settled by invariable practice. The parties complained of (the Archbishop of Canterbury and his Vicar-General), conversant with the law and custom in this matter, rely not upon the abstract justice or propriety of the particular form; on the contrary, they lament the continuance of that empty form; but they rely upon the express terms of the Statute 25 Hen. 8. One of the objects of that Statute was not to leave the means of making Bishops imperfect or uncertain for the time to come, and it is inconceivable that Henry should have allowed any doubt to remain as to the prerogative he proposed to establish. Besides, the Parliament itself had complained of the proceedings of the Archbishop on this subject. The arguments on either side rest on the meaning to be attached to the word "confirm," in the Statute. The word, however, does not occur alone, but is connected with the proposed election: "Confirm the said election." These words plainly indicate the duties devolving on the metropolitan. When the election was real, two things were to be certified to the Archbishop,—that the election was duly made, and the identity of the person. But it is said he is to cite all opposers; and it is a question whether he is to open a Court of this description. Can there be any necessity for this when the person to be confirmed has already been ordained a deacon and a priest? And a Bishop elect comes with the additional testimony derived from the recommendation of the Crown, well qualified to judge of his fitness in all respects. If the election were in the people, I could understand why the Archbishop should inquire and invite opposers; but it has passed away from the people for ages, and is now vested in the Dean and Chapter, on the recommendation of the Crown. The limitation of time imposed in the two great processes of election and confirmation strengthens this view of the matter. The election is a mere form. We are now asked to find some reason why confirmation should be more than a mere form. It is said that the

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word "confirm" had a certain known legal sense. If the command to the Archbishop to confirm is to be understood as giving him power to hold a Court at which all persons who pleased might come in and oppose, the favour of the Sovereign would place the Bishop elect in a position analogous to that of a felon on trial before a jury. The Canon Law forms no part of the Common Law of this realm, unless practice can be shewn to the contrary; and the burden of proof rests on the parties opposing. There is not a trace of any similar case, and it is inconceivable that, during so many centuries, not one person accused of even heretical opinions should have been made a Bishop. Suppose opposers were admitted, what would happen? One might tell of irregularities at college twenty years ago; another might make a charge of vanity, or cast an imputation of illegitimacy. The party accused might know all the allegations to be false; the Archbishop might think the accusers utterly unworthy of belief; nevertheless, the inquiry must proceed, and although the charges should be disproved, the calumny would remain. How much is this observation strengthened when the charge is the unfathomable one of heresy! The life of a Bishop might be frittered away whilst proceedings were pending against him, and his see remain vacant, to the detriment of the church and the people. The evidence that the opposition took place in ancient times is very small; and it is proved that the proceeding has been a mere matter of form during the last three centuries. Any attempt to carry such a scheme into effect must have shewn its utter impracticability. The right of appointment of a Bishop by the Crown, without the interference of the Archbishop, has never been doubted; that any opposer to the confirmation was entitled to appear, was never surmised. There has been only one exception to the rule of the non-appearance of opposers, in the case of Bishop Montagu, when the Vicar-General (Dr. Rives) refused to hear an opposer because the grounds of opposition were not stated in writing. The duty of the Archbishop in this matter is, in my opinion, more analogous to that of a Returning Officer at an election. If the Archbishop should think that the appointment would be inju-

rious, he can remonstrate ; he can advise the Crown not to issue a *Congé d'élire*, or he can pray the Sovereign to supersede it and the Letters Missive. Even at the worst, if the Crown persists in its nomination, acting as his conscience dictates, he can resign his office. Having stated my reasons for thinking that what was contended for in support of the Rule never has been at any time the law of England, I think the Court is bound to refuse the writ. At the same time, I have had the greatest hesitation in coming to this conclusion, especially as I feel that this is a refusal of an inquiry which, in any ordinary case, would at once be granted. But I think, if the writ went, it would be good for nothing, for the return would be a sufficient answer, and I am also bound to consider the consequences of issuing the writ, namely, the frightful state of theological animosity which it would create and perpetuate, and the sanction it would give, upon the avoidance of every see, to the adoption of a similar course, which would open a Court that might never be closed. This Court has a discretion in issuing the writ of *Mandamus*, and in the exercise of that discretion I feel bound to refuse the writ. I verily believe that the safety of the Church and the peace of the State would be perilled by encouraging the smallest doubt as to the true meaning and intention of the Statute of Hen. 8. My brother Coleridge's admirable argument only confirms my impression of the danger of exposing the clear construction of Acts of Parliament to those who would bring down their forgotten books and wipe off in this Court the cobwebs from Decretals and Canons. For these reasons, and thinking myself bound by the Statute, I am of opinion that the Rule must be discharged.

Rule discharged.

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2. *Between steam and sailing vessels*: A steam vessel, proceeding at the rate of nine knots an hour, in a dark night, meeting a sailing vessel, close-hauled on the starboard tack, and, porting her helm, having struck and sunk the latter, held responsible for the damage. "*Gazelle*," 101. A steam vessel is bound to give way to a sailing vessel close-hauled on either tack. *Id.* 105. A steam-tug, coming in collision with a sailing vessel in a narrow cut, leading to a dock, navigable only at a particular period of the tide, when the collision occurred, held responsible. "*Effort*," 279. Sailing vessels ought not, in such circumstances, to be subjected to obstructions by steam vessels. *Id.* 281.
3. *Trinity House Rules*: Where, by neglect of the Rules, on the part of a vessel bound to give way to another vessel, the latter is run down, it is no defence to say that this vessel might have avoided the collision by disobeying the Rule. "*Test*," 276. Though a vessel is not justified, under the Rule, in coming into collision with another vessel if she can escape it, a deviation from the Rule is justifiable only under extraordinary circumstances. *Id.* 278. So that where a vessel, A, on the starboard tack, with the wind three points free, at night, descried another vessel, B, a-head, close-hauled on the larboard tack, approaching, but so far to windward that, believing if B held her course they would have gone clear, she did not give way, whereas B ported her helm, and the vessels came in collision; it was held that A was in fault and B did right. "*George*," 369. *Seable*, that, when two vessels are approaching each other, at night, and it is impossible to ascertain whether the other vessel is closehauled or not, the vessel on the larboard tack, closehauled, should port her helm as well as the vessel on the starboard tack. *Id.* 370. Where two vessels are approaching each other on opposite tacks, and there is the least danger of a collision, the safest and most proper course is for both vessels, when close upon a wind, to port their helms. "*Seringapatam*," 65. A vessel, bound by Rule to port her helm, not doing so at a proper time, held responsible for a collision. "*Stadacona*," 371.
4. *Inevitable Accident*: Inevitable accident is that which no skill and vigilance could possibly have avoided. "*Mellona*," 457. So that where two vessels came in collision in the river St. Lawrence, during thick and foggy weather, the collision was held to have been unavoidable. "*England*," 170. And where two vessels were closely approaching each other in a dark night, and the vessel on the larboard tack was reefing sails and unmanageable, and the vessel on the starboard tack did not perceive her unmanageable state, and kept her course, the collision was held to have been accidental. "*John Buddle*," 387. But where the place of collision was one in which there was a chance of meeting other ships, the weather being thick, the night dark and stormy, with snow falling, and the master of one of the vessels which came in collision had left the deck at the moment to two seamen, such vessel held responsible, there being a possibility that,

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4. A husband charged with cruelty by his wife may plead, in defence and explanation, a habit of provocation on her part, by treating him with contempt, infringing his rules, and exaggerating facts. *Wallscourt v. Wallscourt*, 121. The ground of pleading habit. *Id.* 133. If a wife violates rules and regulations prescribed by her husband (provided they are not absurd or irrational), he has a right to complain. *Id.* 133. A latitude of defence should be allowed to a husband charged by his wife with cruelty. *Id.* 132.

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2. A testatrix, born at Smyrna, of Dutch or Russian parents there resident under the protection of the Dutch consulate, married to a British subject,

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4. The evidence of a single witness to a fact of adultery (she being an accomplice) is insufficient without corroborative evidence. *Simmons v. Simmons*, 342. Such corroborative evidence must not merely shew the probability of the account of the witness, but prove facts *ejusdem generis* with her evidence, and tend to produce the same result. *Id.* 345.
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- signature, filled up from the dictation of the testatrix the succeeding day, but she died without re-executing the paper. *Ward v. Lambert*, 447.
- Where a testator, having duly executed his will, wherein he declared that all codicils added, if signed by him, after executing his will, should be valid, wrote thereon and signed two codicils, and after their date, re-executed his will, and having made certain alterations in it, again re-executed his will, the attesting witnesses, however, deposing to their strong impression and belief that, upon both occasions of re-execution, the testator signed the will after they had subscribed, and being unable to depose to the existence of the codicils at the time of either re-execution:—the will alone pronounced for as originally executed. *Ollive v. Weale*, 486.
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1. In a cause involving the validity of a marriage in a British colony governed by a law of its own, between British subjects, according to the ceremonies of the Church of England, by a clergyman of that Church, it is sufficient to plead that a legal marriage was had, without setting forth the *lex loci*. *Ward v. Day*, 66.
2. Whether, in a cause of damage, in the Court of Admiralty, after pleading, by way of defence, that the collision had been owing to the fault of the other vessel, inevitable accident can be set up in argument. "*England*," 171, 174.

XIV. *Probate*: where a testator, having been separated from his wife, married again, without knowing whether she was dead, and bequeathed his property to his second wife, but described her as his housekeeper, probate decreed to her not as widow, but sole executrix. *Re Hale*, 258. But it appearing that she was herself married at the time of her *de facto* marriage with the testator, and that her husband survived, probate refused to her without the consent of her husband. *Id.* 513.

XV. *Report of Registrar and Merchants in Court of Admiralty*, objections to. "*Repulse*," 348. Items to be allowed in an account between a master co-mortgagee, and a mortgagee in possession. *Id.* 362.

PRINTED FORMS for wills, use of, discouraged. *Re Parslow*, 114. *Re Ryton*, 407. *Re Sayer*, 516.

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PROBATE—see PRACTICE, XIV., and WILL.

PROCTOR, conduct of, in a matrimonial suit, censured. *Jones v. Jones*, 137, 141.

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RECEIVERS OF DROITS, under Wreck and Salvage Act, not subject to the jurisdiction of the Court of Admiralty. "*Tritonia*," 112.

REGISTRAR AND MERCHANTS, in Court of Admiralty, Reports of, objected to. "*Hebe*," 176. Effect of reference to. "*Catherine*," 401. Principles on which amount of damage to be calculated. "*Hebe*," 179.

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REPEALMENT of a will of 1825 by a codicil of 1840 does not prevent the lapse of a legacy to a child dying before 1838 and leaving issue. *Widd v. Reynolds*, 1.

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RESTITUTION of conjugal rights, suits for. *Dyart v. Dyart*, 194. *Simmons v. Simmons*, 324.

REVIVAL of a will: where a codicil refers to a revoked existing will by date, the intention to revive is shewn upon the face of the codicil. *Payne v. Trappes*, 147. So that where a testator, having executed a will in 1837, in 1838 executed another inconsistent will, cancelling one copy of the former will and retaining the other copy, and in 1839 executed a codicil as a codicil to the will of 1837, it was held that the will of 1837 was thereby revived, parol evidence being inadmissible to shew that the reference to the will of 1837 in the codicil of 1839 was by a mistake. *Id.* 478. But where a codicil purported to be a codicil to a will of 1833, instead of to a will of 1837, the former will having been destroyed, parol evidence was admitted, and the mistake proved. *Quincey v. Quincey*, 154.

REVOCATION of testamentary instruments:

1. Where the name of an executor had been erased, after execution, and that of another written by the testator upon the erasure, held to be an absolute revocation, not a substitution. *Re Bedford*, 188.
2. Where all the testamentary papers of the deceased (dated before 1838) were found after his death to have had his signature struck through, and no positive evidence could be had as to when it was done, held that it was done after 1838, and not *animo revocandi*. *Re De Bode*, 189.
3. Where a testator had cut out parts of his will after execution, held to be a revocation *pro tanto*. *Re Cooke*, 390.
4. Where a testator, having duly executed his will, executed a codicil, and afterwards re-executed the will without reference to the codicil revoking all former instruments, the codicil refused probate on motion. *Re Naser*, 457 n.
5. Where a codicil had been executed in duplicate, and one copy was destroyed by the testator, who substituted another codicil for it, but retained the other copy until his death, this copy nevertheless excluded from the probate. *Re Hains*, 621.
6. Where a testator added two codicils to his will, which will he afterwards destroyed *animo revocandi*, expressing at the time of doing so his anxiety that the act should not affect the codicils, and subsequently intimated his belief that they were operative, the destruction of the will held not to revoke the codicils. *Clogstoun v. Walcott*, 623.

See **EXECUTION**, 3.

SALVAGE:

1. A commander of a Queen's ship, rendering assistance to a merchant-vessel on the coast of Africa, entitled to salvage. "*Charlotte Wylla*," 4. Considerations which apply to officers of the Navy rendering such assistance. *Id.* 6. Especially on the coast of Africa. *Id.* 8.
2. Where services had been rendered by a valuable steam-vessel to a merchant-schooner, the amount of salvage awarded by the Court of Admiralty increased on appeal. *Caledonian Steam Co. v. Hutton*, 156. Principles which apply to salvage services rendered by large and valuable steamers. "*General Palmer*," 159 n.
3. Where a steam-tug, after rendering a salvage service to a sailing-vessel, in charge of a pilot, was employed by the saved vessel to tow her, and whilst so towed she got on shore, it was held that the tug had no claim

for salvage. *Shersby v. Hibbert*, 470. In such cases, the master of the tug is not released from all responsibility respecting the direction of the ship towed; but it is the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship. *Id.* [See the rule in collision cases, COLLISION, 1.]

4. Of a derelict subjected to Wreck and Salvage Act. "*Tritonia*," Supp. i.
5. Peculiarity of salvage cases as to questions of costs. "*William*," 109.

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SEQUESTRATION, decree of, which had been issued at the suit of the Treasurer of Queen Anne's Bounty against a clerk for refusing payment to that corporation of sums advanced under 1 and 2 Vict. c. 106, declared null. *Bluck v. Hodgson*, 167. The treasurer of that Corporation has not a right to sue. *Id.* 169.

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STATUTES, construction of:

- 6 Will. 4, c. 14—73.
- 6 & 7 Will. 4, c. 77—192.
- 1 Vict. c. 26—380, 434 and *passim*.
- 1 & 2 Vict. c. 106—167.
- 3 & 4 Vict. c. 86—119.
- 6 & 7 Vict. c. 85—79.
- 7 & 8 Vict. c. 112—71.
- 9 & 10 Vict. c. 99—110.

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VERDICT, in an action for *crim. con.*, effect of, in a suit for divorce by reason of adultery. *Fraser v. Fraser*, 20.

WAGES, suits for, by masters of ships:

1. To entitle a master to sue *in rem*, the owner must be legally bankrupt or legally insolvent. "*Great Northern*," 71. So that where the owner had filed a declaration of insolvency (declared to be an act of bankruptcy) in Ireland, but no Commission was sued out, a protest against the jurisdiction of the Court of Admiralty was sustained. *Id.* 74.
2. Where the master is co-mortgagee of the ship, his wages subject to a settlement of his accounts with the mortgagee in possession. "*Repulse*," 348.

WILL:

1. Where a testator bequeathed his whole property for life to "his dear wife E.," his wife H. being alive, administration with will annexed refused to E., to whom the testator had been married *de facto*. *Re Lambert*, 94.
2. An instrument prepared in the form of a deed, but unsealed, directing trusts to be executed after the testatrix's death, and not operative as a deed, admitted to probate. *Re Montgomery*, 99.
3. Where a will exhibited alterations, unattested, and a codicil, dated thirteen months after, was attached to the foot, but there was no direct evidence when the alterations were made, upon internal evidence, the will as altered was admitted to probate. *Re Bradley*, 95, 186. Unattested memoranda at the end of a will, on which was written a codicil, excluded from probate. *Re Baldwin*, 293.

4. A paper, erroneously described by the drawer as the "last will" of the testatrix, who had a subsisting will, admitted as an addition thereto. *Re Luffman*, 186. A paper, intended by the testatrix to be a codicil to her will, but described by the writer, through misapprehension, as her "last will and testament," admitted as a codicil to the will. *Re Langhorn*, 512.
5. Where a will was made in the English form by a testatrix (born at Smyrna, of Dutch or Russian parents) who had acquired an English domicile by marriage, and resided, after her husband's death until her own, in the Levant, disposing of property in England, held to be subject to the English law. *Gout v. Zimmermann*, 440.
6. A letter, signed by the deceased, but not attested, containing testamentary directions, and a subsequent paper regularly executed, referring to "the executors nominated in my will," being the persons named in the letter,—admitted as the will and codicil of the testator. *Re Hally*, 510.
7. Where a will was written on a printed form misunderstood by the writer, who inserted the dispositive part after the conclusion of the will, part only of the paper admitted to probate. *Re Sayer*, 515.
8. A will and codicil pronounced against on the ground of fraud and conspiracy. *Wintle v. Ford*, 517.
9. Where a testator, residing at Guadaloupe, in his will referred to a "letter enclosed," addressed to his executor in England, which letter after his death was not forthcoming, probate of the alleged contents of the letter was refused. *Re Norman*, 550.
10. A will of 1830, written the day before the testator's marriage, in contemplation of that event, pronounced for, notwithstanding birth of issue, on evidence of adherence. *Tapster v. Holtzapffel*, 554.
11. A codicil, varying bequests in the will, to the benefit of the drawer, the testator being in a state of doubtful capacity, there being no proof of knowledge of contents, pronounced against. *Michell v. Thomas*, 600.
12. A paper, not in form testamentary, containing the "wishes" of the testatrix, duly executed; and a list of articles referred to in the former paper, pronounced for as together containing the will. *Re Lowrey*, 619.
13. Will of a soldier, in actual military service, executed by a mark, without proof of identity, admitted. *Re Prendergast*, 92. Of a mariner at sea, consisting of entries in a book, written in pencil. *Re Thompson*, 596.

See ATTESTATION—CAPACITY—DESTRUCTION—DOMICIL—ECCENTRICITY—EXECUTION—EXECUTORS—INCORPORATION—LEGACY—LEGATEE—LIMITATION—PRACTICE (I.; II.; XII. 1, 2, 4, 6, 7; XIV.)—REPUBLICATION—REVIVAL—REVOCATION.

WRECK AND SALVAGE ACT, proceedings under. "*Tritonia*," 110, Supp. i.

END OF VOL. V.

ERRATA.

P. 95, marginal note, *for* "seventeen months," *read* "twenty-five months."

P. 107, bottom of page, *for* "Donson," *read* "Donson."

P. 150, line 3 from bottom, *for* "re-examination," *read* "re-execution."

P. 528, line 7, the Proctor for the pauper retired from the cause *before* publication of the evidence.





